



NUNC COGNOSCO EX PARTE



THOMAS J. BATA LIBRARY  
TRENT UNIVERSITY



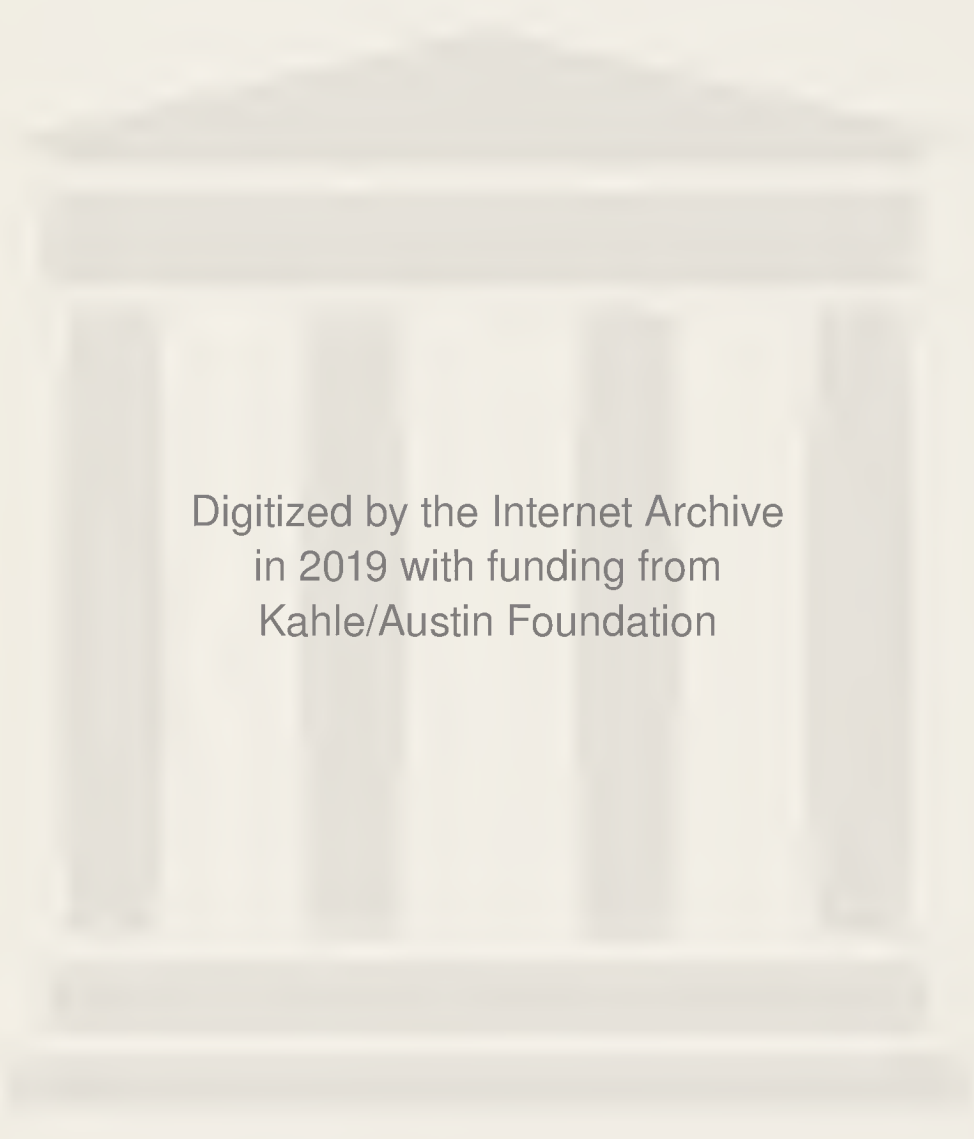








THE BRITISH YEAR BOOK OF  
INTERNATIONAL LAW



Digitized by the Internet Archive  
in 2019 with funding from  
Kahle/Austin Foundation

THE  
BRITISH YEAR BOOK OF  
INTERNATIONAL LAW  
1980

FIFTY-FIRST YEAR OF ISSUE

OXFORD  
AT THE CLARENDON PRESS

1982

*Oxford University Press, Walton Street, Oxford OX2 6DP*

LONDON GLASGOW NEW YORK TORONTO  
DELHI BOMBAY CALCUTTA MADRAS KARACHI  
KUALA LUMPUR SINGAPORE HONG KONG TOKYO  
NAIROBI DAR ES SALAAM CAPE TOWN  
MELBOURNE AUCKLAND

*and associate companies in*

BEIRUT BERLIN IBADAN MEXICO CITY

© *Unless otherwise stated, Oxford University Press 1982*

*Published in the United States by  
Oxford University Press, New York*

*All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means electronic, mechanical, photocopying, recording, or otherwise, without the prior permission of Oxford University Press*

**British Library Cataloguing in Publication Data**

The British year book of international law.

—51st (1980)

1. International law—Periodicals

341'.05 JX1

ISBN 0-19-825386-9

The Library of Congress Cataloged this Serial as follows:

The **British** year book of international law. v. [1]—1920/21—  
London, New York [etc.] Oxford University Press [etc.]

Publications suspended 1940-43.

Vol. 32 covers 1955 and 1956.

Vols. for 1921/22—published under the auspices of the Royal Institute of International Affairs (1921/22-1927 under an earlier name: British Institute of International Affairs)

INDEXES:

Vols. 1-10, 1920/21-1929, *in* v. 10.

Vols. 11-20, 1930-39, *in* v. 20.

1. International law—Yearbooks. 1. Royal Institute of International Affairs.

X21.B7

20-16936 rev 2\*

*Printed in Great Britain  
at the University Press, Oxford  
by Eric Buckley  
Printer to the University*

*Editors*

PROFESSOR R. Y. JENNINGS

PROFESSOR IAN BROWNLIE

*Assistant Editor:* MRS. C. A. HOPKINS

*Editorial Committee*

SIR GERALD FITZMAURICE (Chairman)

DR. M. E. BATHURST

PROFESSOR D. W. BOWETT

PROFESSOR G. I. A. D. DRAPER

SIR VINCENT EVANS

PROFESSOR J. E. S. FAWCETT

PROFESSOR R. GRAVESON

JOYCE GUTTERIDGE

PROFESSOR ROSALYN HIGGINS

PROFESSOR D. H. N. JOHNSON

E. LAUTERPACHT

PROFESSOR I. C. MACGIBBON

DR. F. A. MANN

DR. J. H. C. MORRIS

LORD NOEL-BAKER

PROFESSOR C. PARRY

PROFESSOR K. R. SIMMONDS

SIR IAN SINCLAIR

SIR FRANCIS VALLAT

PROFESSOR SIR HUMPHREY WALDOCK

PROFESSOR GILLIAN WHITE

LORD WILBERFORCE

PROFESSOR B. A. WORTLEY

Editorial Communications should be addressed as follows:

*Articles and Notes:*

PROFESSOR R. Y. JENNINGS

Jesus College, Cambridge, CB5 8BL.

*Books for Review:*

PROFESSOR IAN BROWNLIE

All Souls College, Oxford, OX1 4AL.

The Editors and members of the Editorial Committee do not make themselves in any way responsible for the views expressed by contributors, whether the contributions are signed or not.





# CONTENTS

THE CONTRIBUTION OF PROFESSOR D. P. O'CONNELL TO THE DISCIPLINE OF INTERNATIONAL LAW By JAMES CRAWFORD	I
THE PROBLEM OF THE 'NON-APPEARING' DEFENDANT GOVERNMENT By SIR GERALD FITZMAURICE	89
THE FIRST 'WORLD BANK' ARBITRATION ( <i>HOLIDAY INNS v. MOROCCO</i> )—SOME LEGAL PROBLEMS By PIERRE LALIVE	123
THE BOUNDARY BETWEEN ENGLAND AND SCOTLAND IN THE SOLWAY FIRTH By COLIN WARBRICK	163
ADMISSION TO MEMBERSHIP IN INTERNATIONAL ORGANIZATIONS: THE CASE OF NAMIBIA By EBERE OSIEKE	189
THE INEQUALITY OF THE APPLICABLE LAW By RONALD GRAVESON	231
NOTES:	
English International Legal Doctrine in Soviet Translations By W. E. BUTLER	253
Delimitation of Maritime Zones—Recent Commonwealth Decisions By GEOFFREY MARSTON	263
REVIEWS OF BOOKS:	
Bredimas, Anna: <i>Methods of Interpretation and Community Law</i>	269
Brownlie, Ian: <i>Principles of Public International Law</i> (3rd edition)	270
Brownlie, Ian and Burns, Ian R.: <i>African Boundaries, a Legal and Diplomatic Encyclopaedia</i>	272
Butler, William E. (Editor): <i>International Law in Comparative Perspective</i>	273
Cassese, A. (Editor): <i>The New Humanitarian Law of Armed Conflict</i>	274
Cassese, A. (Editor): <i>Parliamentary Control over Foreign Policy: Legal Essays</i>	275
Cassese, A. (Editor): <i>U.N. Law/Fundamental Rights: Two Topics in International Law</i>	276
Eckert, Ross D.: <i>The Enclosure of Ocean Resources</i>	278
Eggers, Winfried: <i>Die Staatenbeschwerde, das Verfahren vor der Vergleichskommission nach der Rassendiskriminierungskonvention im Lichte vorliegender Modellverfahren</i>	278

## REVIEWS OF BOOKS:

European Court of Human Rights: <i>Publications, Series A—Judgments and Decisions</i> , volumes 13–33	280
Evans, Alona L. and Murphy, John F. (Editors): <i>Legal Aspects of International Terrorism</i>	283
Feinberg, Nathan: <i>Studies in International Law. With Special Reference to the Arab-Israel Conflict</i>	284
Greenfield, Jeanette: <i>China and the Law of the Sea, Air, and Environment</i>	284
Henkin, Louis: <i>How Nations Behave. Law and Foreign Policy</i> (2nd edition)	285
Imhoff, Rodolph S.: <i>Le Gatt et les zones du libre échange</i>	286
Jasentuliyana, Nandasiri and Lee, Roy S. K. (Editors): <i>Manual on Space Law</i>	287
Kuusi, Juha: <i>The Host State and the Transnational Corporation</i>	287
Macdonald, Ronald St. John, Johnston, Douglas M. and Morris, Gerald L. (Editors): <i>The International Law and Policy of Human Welfare</i>	288
Martin, Antoine: <i>L'Estoppel en droit international public. Précédé d'un aperçu de la théorie de l'estoppel en droit anglais</i>	290
Merrills, J. G.: <i>A Current Bibliography of International Law</i>	292
Papadakis, Nikos: <i>International Law of the Sea: a Bibliography</i>	293
Prott, Lyndel V.: <i>The Latent Power of Culture and the International Judge</i>	294
Ramcharan, B. G. (Editor): <i>Human Rights: Thirty Years after the Universal Declaration</i>	295
Ranjeva, Raymond: <i>La Succession d'organisations internationales en Afrique</i>	296
Schweisfurth, Theodor: <i>Sozialistisches Voelkerrecht? Darstellung-Analyse-Wertung der sowjet-marxistischen Theorie vom Voelkerrecht 'neuen Typs'</i>	297
Starace, Vincenzo and Panzera, Antonio Filippo (Editors): <i>La Protezione Internazionale del Mare contro l'Inquinamento</i>	298
Weis, P.: <i>Nationality and Statelessness in International Law</i> (2nd edition)	298
Wetter, J. Gillis: <i>The International Judicial Process: Public and Private</i>	299
Williams, Sharon A.: <i>The International and National Protection of Movable Cultural Property: a Comparative Study</i>	300

## DECISIONS OF BRITISH COURTS DURING 1980 INVOLVING QUESTIONS OF PUBLIC INTERNATIONAL LAW

By JAMES CRAWFORD	303
-------------------	-----

## DECISIONS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS DURING 1980

By D. J. HARRIS	329
-----------------	-----

## DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES DURING 1979

By MICHAEL AKEHURST	343
---------------------	-----

## CONTENTS

ix

UNITED KINGDOM MATERIALS ON INTERNATIONAL LAW 1980

*Edited by* GEOFFREY MARSTON

355

TABLE OF CASES

497

INDEX

501



# THE CONTRIBUTION OF PROFESSOR D. P. O'CONNELL TO THE DISCIPLINE OF INTERNATIONAL LAW\*

By JAMES CRAWFORD<sup>1</sup>

## 1. INTRODUCTION

THE untimely death of Daniel Patrick O'Connell, on 8 June 1979 at the age of 54, was noted briefly in the last volume of this *Year Book*.<sup>2</sup> The purpose of this contribution is not so much to provide details of his life or non-literary work,<sup>3</sup> as to attempt to assess his contribution to the study and discipline of international law.

O'Connell's literary output was enormous. His books include the two-volume general treatise (which he took to its second edition),<sup>4</sup> a student textbook, two monographs on State succession (1956, 1967, the latter also in two volumes), a study on the relevance of law in naval conflicts and a full account of the law of the sea (to be published shortly).<sup>5</sup> His contributions in the periodical literature on these and other topics were extensive, many in themselves virtually of monograph length.<sup>6</sup> It would be impossible in an article to discuss all his written work; the purpose here is rather to assess the extent to which O'Connell's doctrine on specific important problems was influential in the literature or practice of international law, whether as a contribution to its development or elucidation or by way of commentary or criticism upon it. Of course, such

\* © Dr. James Crawford, 1981.

<sup>1</sup> D.Phil. (Oxon.), Senior Lecturer in Law in the University of Adelaide.

<sup>2</sup> This *Year Book*, 50 (1979), p. x. See also *The Daily Telegraph*, 12 June 1979; *Australian Law Journal*, 53 (1979), pp. 679-80; *Revue générale de droit international public*, 83 (1979), pp. 900-1; *Adelaide Law Review*, 7 (1980), pp. 166-71; *Australian Year Book of International Law*, 7 (1976-9), pp. xxiii-xxix.

<sup>3</sup> O'Connell was born in Auckland, New Zealand, in 1924. He studied at the Universities of New Zealand and Cambridge. Appointed a Reader in Law at the University of Adelaide in 1953; Professor of International Law, 1962-72. He was elected Chichele Professor of Public International Law in the University of Oxford, taking up the post in 1972. He was Director of Studies of the International Law Association, 1973-9, and elected an Associé de l'Institut in 1967. His interests, inside and outside the law, were wide. He was a Commander in the Royal Australian Naval Reserve from 1966 to 1972 when he transferred to the Royal Naval Reserve. He was counsel for Australia in the *Templar* arbitration (see *United Nations Treaty Series*, vol. 598, p. 25) and the *Nuclear Tests* case, and for Greece in the *Aegean Sea Continental Shelf* case. He was greatly interested in European political history: he wrote a full-length biography *Richelieu* (1968), and was a Fellow of the Royal Historical Society. For further details see the accounts cited in the previous note.

<sup>4</sup> *International Law* (1st edn., 1965, 2nd edn., 1970). For a comprehensive review see Skubiszewski, this *Year Book*, 45 (1971), pp. 493-501. A third edition is planned.

<sup>5</sup> *The International Law of the Sea* (to be published in 1982 by Oxford University Press). The manuscript is being prepared for publication by Professor I. A. Shearer of the University of New South Wales.

<sup>6</sup> See the Bibliography, below, pp. 83-7.



an assessment must necessarily be provisional, but an attempt to summarize his distinctive views may itself, perhaps, contribute to the debate, and to the resolution of problems that interested and worried him.

Analysing O'Connell's contribution to international legal doctrine is made easier by the fact that, with few exceptions, his major work on international law fell into a few clearly defined categories:<sup>1</sup> State succession, the use of force at sea, the development of the law of the sea (specifically, the maritime claims of States), the legal problems of coastal jurisdiction in federations and (though to a lesser extent) the history and philosophy of international law. It would be premature, in this paper, to analyse his general contribution to the law of the sea; but it is proposed to examine, in more or less detail, the three other specific areas in which his contribution to the debate can be assessed with some clarity. A concluding section will review O'Connell's general philosophy, method and views about international law.

## 2. STATE SUCCESSION: THE CONTINUITY THESIS AND ITS RIVALS

O'Connell's first substantial study in international law was of State succession. It was the subject of his first Cambridge doctorate, obtained in 1951 after two years' research under the supervision of Hersch Lauterpacht.<sup>2</sup> It was the subject of one of his first articles, and of his last. In the decade before 1967, much of his time was spent on it, both as an individual scholar and as the rapporteur of a Committee of the International Law Association.<sup>3</sup> Not surprisingly in view of the relatively undeveloped modern practice in the late 1940s, and its subsequent extent and importance as a concomitant of decolonization, his views on State succession underwent a considerable evolution. As they developed, they came increasingly to contrast, and to some extent to conflict, with alternative views developing as a result of decolonization, and which would be taken up within the International Law Commission in its discussion of the topic. After the publication, in 1967, of his two-volume

<sup>1</sup> He also wrote quite extensively on problems of imperial constitutional law, and more recently played some part in the controversy surrounding the Governor-General's dismissal of the Australian Prime Minister, E. G. Whitlam, in November 1975. These matters will not be dealt with here.

<sup>2</sup> *The Law of State Succession* (Cambridge, Ph.D., 1951).

<sup>3</sup> The I.L.A.'s deliberations can be traced in its Reports. See: Note, *Report of the Fifty-first Conference* (Tokyo, 1964), p. 868; Discussion and Report, *Report of the Fifty-second Conference* (Helsinki, 1966), pp. 557-95 (treaties); Discussion and Report, *Report of the Fifty-third Conference* (Buenos Aires, 1968), pp. 589-632 (treaties and public debt); Discussion and Report, *Report of the Fifty-fourth Conference* (The Hague, 1970), pp. 92-150 (miscellaneous treaty matters and public debt); Discussion and Report, *Report of the Fifty-fifth Conference* (New York, 1972), pp. 647-60 (government contracts). See also the Handbook prepared under O'Connell's direction: *The Effects of Independence on Treaties* (London, 1965). In 1968 the Conference accepted the Committee's proposals on treaties, embodying a presumption of continuity of treaties until notification to the contrary by the successor State. By implication the category of dispositive treaties was rejected. No substantive resolutions on non-treaty succession were adopted.

study, O'Connell's chief interests were directed elsewhere,<sup>1</sup> but he remained an interested and critical commentator in the continuing debate over the extent and nature of the rules of succession.

It is proposed first to outline the ways in which his views developed from 1950 onwards, secondly, to describe his mature doctrine, and thirdly, to say something of the wider debate in which he engaged, and of its outcome.

## 2.1. THE DEVELOPMENT OF O'CONNELL'S IDEAS ON STATE SUCCESSION

Despite a degree of interaction between them, it is usual to distinguish questions of treaty succession from other issues—a distinction now entrenched in the work of the International Law Commission, but also adopted by O'Connell.

### (1) *State succession in respect of treaties*

In 1950 the existence of any but negative rules of State succession with respect to treaties was generally doubted: at any rate the accepted position could be stated in simple terms. The treaty obligations of a State, bilateral or multilateral, lapsed with the State; conversely, apart from the doctrine of *rebus sic stantibus* or any issue of treaty interpretation, while the State survived (even if diminished), so did its treaties. A successor State was under no obligation to accept any of the predecessor State's treaties (though it might do so by a process of novation, tacit or express: this required the consent of the other parties). The treaties of a State generally extended to its after-acquired territory, but this might be regarded simply as a presumption as to the original intention of the parties; certainly it could be rebutted by indications of a contrary intention. The only exception to non-succession was the uncertain category of State servitudes. Treaty obligations which were somehow 'tied' to the land, local or dispositive, passed with it and bound the successor. But just how this happened was something of a mystery.<sup>2</sup>

The discussion of treaty succession in O'Connell's published doctoral thesis, *The Law of State Succession* (1956), adopts this accepted view very much in its entirety. Universal succession theories are 'now everywhere rejected'.<sup>3</sup> The negative theory is simply taken for granted. Instead:

The effect of change of sovereignty on treaties is not a manifestation of some general principle or rule of State succession, but rather a matter of treaty law and interpretation.<sup>4</sup>

Thus personal treaties lapse on extinction: 'speaking generally', new States are free of treaty obligations: 'treaties of a parent do not bind a

<sup>1</sup> He once said that he had no intention of producing a new edition of *State Succession*. . . .

<sup>2</sup> See, e.g., *Oppenheim's International Law*, vol. 1 (8th edn., ed. Lauterpacht, 1955), pp. 156–69.

<sup>3</sup> *The Law of State Succession* (Cambridge U.P., 1956), p. 130; cf. pp. 78–9, 100.

<sup>4</sup> *Ibid.*, p. 15.

seceding State'.<sup>1</sup> Exceptions are either doubtful or depend upon some element of continuity of personality or novation.

On the other hand, the category of 'dispositive treaties' is accepted. Various types of dispositive or 'real' rights are suggested (remarkably, these include capitulations).<sup>2</sup> This discussion draws on an earlier account in the *Canadian Bar Review*, but apart from a reference to the 'real character of international organization and solidarity',<sup>3</sup> no analysis of the concept is offered in either place. There is little indication of how 'real rights' can be created, and none at all of the criteria of dispositive treaties.<sup>4</sup>

This is a traditional and in some ways a rather summary treatment. O'Connell's interest was clearly elsewhere, in the notion of acquired rights and its application to the various problems of succession to rights and duties under municipal law. The feeling persists that the account of treaty succession is a temporary one, unsatisfying to O'Connell himself. There is, for example, a hint that the 'dispositive' category might be extended much more widely to cover what he came to describe as 'localized' treaties.<sup>5</sup> And, although multilateral treaties are no different in principle from bilateral treaties, there is some difference in practice, which suggests an *a priori* distinction between 'legislative' and 'executive' treaties.<sup>6</sup> But this distinction is only briefly advocated, and the basic propositions already formulated are not disturbed.<sup>7</sup>

*The Law of State Succession* was quite favourably reviewed,<sup>8</sup> although there was understandable puzzlement at the failure to cite material after 1951. But one reviewer, in expressing a degree of disappointment, pointed out that a full treatment would require 'a volume or volumes not less than double this size':

<sup>1</sup> *The Law of State Succession* (1956), pp. 32, 33.

<sup>2</sup> *Ibid.*, pp. 49-63. On capitulations, pp. 59-63.

<sup>3</sup> 'Reconsideration of the Doctrine of International Servitude', *Canadian Bar Review*, 30 (1952), pp. 807-18 at p. 810.

<sup>4</sup> The list given is diverse enough: in the *Canadian Bar Review* article it is suggested that fisheries agreements probably cannot be dispositive (p. 810, explaining the *North Atlantic Fisheries* arbitration), but the suggestion is withdrawn in *State Succession*, and discussion of the arbitration relegated to a footnote (p. 52 n. 3; cf. p. 51 n. 7). *Per contra*, the Anglo-Iranian oil concession of 1932 might be a servitude: *Canadian Bar Review*, 30 (1952), pp. 807-18 at pp. 814-15.

<sup>5</sup> *The Law of State Succession* (1956), p. 63.

<sup>6</sup> *Ibid.*, pp. 68-9.

<sup>7</sup> In fact the notion that 'legislative' treaties might be subject to special rules had already been suggested by Jenks, in an influential article based largely on the I.L.O. practice he had himself been instrumental in establishing: 'State Succession in respect of Law-Making Treaties', this *Year Book*, 29 (1952), pp. 105-44. But the article is nowhere cited, reinforcing the provenance of *The Law of State Succession* as a pre-1952 unrevised thesis (as O'Connell later admitted: this *Year Book*, 38 (1962), p. 85 n. 1). Lauterpacht in 1955 described the Jenks thesis as 'substantiated to a limited extent by some recent practice' (op. cit. above (p. 3 n. 2), p. 168 n. 1), but the proposition in the text (as well as prescient) was ambiguous and reserved: 'there is room for the view that in case of separation resulting in the emergence of a new State the latter is bound by—or at least entitled to accede to—general treaties of a "law-making" nature, especially those of a humanitarian character' (*ibid.*, p. 167).

<sup>8</sup> See Bowett, *Journal of the Society of Public Teachers of Law*, 3 (1956), pp. 247-8; Mann, *Law Quarterly Review*, 72 (1956), pp. 590-1; Seidl-Hohenveldern, *American Journal of Comparative Law*, 5 (1956), pp. 533-4; J. Starke, *Sydney Law Review*, 2 (1958), pp. 514-616.



with considerable revision and amplification, this book could well be the monumental work on Succession which its author . . . is so clearly capable of producing.<sup>1</sup>

Whether or not he took Starke's hint, this was precisely what O'Connell set out to do when he returned to the subject at the end of the 1950s. One catalyst for his re-examination may have been the prospective establishment of an International Law Association Committee to investigate the problems of State succession. In this connection he was able, in 1965, to visit African and other countries and to investigate modern practice in a way he had not been able to do as a student at Cambridge. But more important may have been his own recognition that the problems of succession were 'more complex than I had earlier conceded'.<sup>2</sup> This statement was made about the problem of acquired rights and 'internal relations', but it applied even more forcefully to his new work on treaty succession. Indeed, whereas the treatment of acquired rights in 1967 is a considerable refinement and elaboration of the thesis adopted in *The Law of State Succession* (1956), his position on treaty succession is almost a complete reversal of his earlier views. The process by which such a radical change of mind occurred can be traced in a series of chapters and articles written from 1960 to 1965.

The first work which has to be considered is chapter 12 of the first edition of *International Law*, the general treatise. This was not published until 1965, but according to the Preface the effective date of information was 31 December 1961, and it seems quite likely that the 'State Succession' chapter was written in 1959 or 1960, with the subsequent addition only of references. What is significant for present purposes is that the statement of the rules of treaty succession differs little from that set out in *The Law of State Succession*. Personal treaties do not bind the successor State, and 'generally speaking, multilateral treaties are regarded as no different from bilateral, and their fate in cases of State succession should be the same.'<sup>3</sup> On the other hand, dispositive treaties do survive change of sovereignty (and now the category clearly does include rights to fishing).<sup>4</sup>

There are, however, two developments, both expressed in very tentative and inconclusive terms. The first relates to the distinction between State succession and change of government, a matter which, as we will see, O'Connell always found troublesome.

The traditional law of State succession has been excessively influenced by the notion of change of personality, a notion with roots in the philosophy of personal rule of the eighteenth century, and scarcely apposite for the solution of modern problems. . . . This suggests that a revision is called for concerning the artificial distinction between change of sovereignty and change of government, a distinction valid only formally, and frequently misleading as to the extent and reality of the change. This is not an argument in favour of permitting successor governments

<sup>1</sup> Starke, loc. cit. (previous note), p. 616.

<sup>2</sup> *State Succession in Municipal Law and International Law* (2 vols., Cambridge U.P., 1967), vol. 1, p. vi ('Preface').

<sup>3</sup> *International Law* (2 vols., London, 1965), vol. 1, p. 435.

<sup>4</sup> Ibid., pp. 432-3.

to repudiate the acts of their predecessors, but rather in favour of a more general transmission of rights and obligations in the case of State succession, and it is believed that the tendency in practice is toward this more general transmission.<sup>1</sup>

But the argument is taken no further: even in 1967 it will only be pursued in a half-hearted way.<sup>2</sup>

Secondly, the possibility that *some* form of succession to treaties might occur is raised, though no coherent explanation is offered. Personal treaties do not survive 'except perhaps in certain cases where change of sovereignty occurs by evolution'.<sup>3</sup> And in the case of multilateral treaties: practice is tending towards a *de facto* succession to at least those conventions which have a humanitarian aim. It is significant that whether or not there is a transmission clause, the new States have been willing to accept succession to such instruments. Perhaps the same policy explains why all the new States, except Israel . . . have automatically succeeded to the International Labour Conventions, but juridically this practice, which is exceptional among international organizations, is difficult to justify, unless the theory of lapse of personal treaties is revised, at least in the case of independence as distinct from cession or annexation.<sup>4</sup>

To say that this succession is 'automatic' is, however, to beg the question, since he concedes that tacit or express assignment of treaties is available to bring about a form of succession by novation, yet gives no reason for rejecting that explanation. In their tentative undeveloped form these are indications as much of changes in O'Connell's approach to the problem as of any developments in practice.

The changes in his position are exposed, in an interesting and much more detailed way, in two substantial articles in this *Year Book*, which represent the real beginning of the process of rethinking culminating in *State Succession in Municipal Law and International Law* (1967). In both, the general strategy adopted is to start with apparently clear cases of treaty succession, and to attempt to exclude such cases from any of the recognized or possible exceptions to the 'clean-slate' theory. Once this is done, the only resort is a reconsideration of the basic theory itself, and its reformulation as a rule or presumption of treaty continuity despite succession. Alternatively, possible 'exceptions' can be extended by analogy so as to displace the initial negative assumptions and create a positive rule.

In the first of these articles, 'Independence and Succession to Treaties',<sup>5</sup> the standard case is taken to be the 'localized treaty', in a situation where a colonial territory gradually emerges to independence. In such cases, as the treaty lists of Australia, New Zealand and Southern Rhodesia show,<sup>6</sup> non-dispositive treaties

<sup>1</sup> *International Law* (1965), vol. 1, pp. 425-6.

<sup>2</sup> Below, pp. 18-20.

<sup>3</sup> *International Law* (1965), vol. 1, p. 427 (citing the older Dominions).

<sup>4</sup> *Ibid.*, p. 435.

<sup>5</sup> This *Year Book*, 38 (1962), pp. 84-180.

<sup>6</sup> *Ibid.*, pp. 88-9. This use of the Southern Rhodesian practice might seem incautious, given the controversial status of Southern Rhodesia at the time, but O'Connell was unsympathetic towards

do in fact devolve upon newly independent States . . . [I]t is clear that independence as a category of factual succession constitutes an exception to or modification of the traditional law of State Succession.<sup>1</sup>

However, one particular explanation for this may be that the older Dominions passed through a stage of 'semi-sovereignty'; that is, that they acquired an intermediate form of legal personality to which treaty obligations could be attributed and which could be regarded as continuing in the eventual State personality of the Dominion after independence.<sup>2</sup> This possibility is not only conceded but extended: it applies to the (perhaps brief) period before independence when the Dominions had a degree of distinct international personality (including treaty-making competence), but more importantly, also to the longer period of separate internal competence for treaty *performance* in an internationally undivided Empire:

the rationale of the devolution of Imperial treaties was their territorial application, which was specific (by implication or declaration) only in the case of those categories of treaties which are found in the treaty lists, and which were the kinds of treaties in respect of which the colonial authorities possessed the initiative.<sup>3</sup>

As a result of this undoubted development, a new rule is proposed:

international law acknowledges a devolution of treaties when a portion of an old State acquires international personality only after a stage of autonomous administration, and where treaties were specifically made and applied to the territory.<sup>4</sup>

The question then becomes whether more recent cases of independence are to be treated in the same way:

To distinguish the newly independent States from the older Dominions is difficult without proceeding to distinguish between the former, for some of these have passed through evolutionary processes almost identical with that of the older Dominions, and others through processes less obviously parallel. Yet it is unlikely that such a distinction will be politically acceptable. It may be, then, that the better course is to abandon the attempt either to assimilate the new countries to, or to distinguish them from, the older Dominions and concentrate instead on examining whether the rules of State succession may not have so far altered in the case of independence (perhaps as distinct from cession or annexation) as to permit a devolution of at least some categories of treaty. The devolution in the case of the older Dominions may offer some guidance as to these categories, and proof would

suggestions that new or special rules prevented the acquisition of statehood or sovereignty in previously orthodox ways. Recognized or not, he probably regarded Southern Rhodesia as a State after 1965.

<sup>1</sup> Ibid., p. 86; cf. p. 97.

<sup>2</sup> Ibid., p. 90.

<sup>3</sup> Ibid., pp. 92-3. O'Connell was not entirely clear as to when exactly the older Dominions became independent: cf. 'The Evolution of Australia's International Personality' in *International Law in Australia* (1965), p. 18, with *State Succession in International Law and Municipal Law* (1967), vol. 1, p. 46.

<sup>4</sup> This *Year Book*, 38 (1962), pp. 84-180 at p. 103.



then have to be offered that the new States regard themselves as parties to treaties of Great Britain which fall within these categories. If one treats the devolution agreements as substantially irrelevant to the transmission of treaties, then one may discover indications in the case of a fairly wide spectrum of multilateral conventions that succession has in fact occurred in the case of the new States. The real question, then, may be, not the exceptional nature of independence as a constitutional process in the Commonwealth, but the exceptions now becoming manifest to the idea that a successor State begins life without commitments.<sup>1</sup>

Other examples, such as the practice with multilateral law-making Conventions and the cases of protectorates and trust territories, are then adduced to add support to the thesis that there is a 'pressure towards continuity of treaty relationships in the event of the termination of colonial rule [which] is at least as great as that against it'.<sup>2</sup> This pressure precludes automatic acceptance of the negative theory, but it is not so overwhelming or unequivocal as to compel the adoption of some general rule of succession.

At this point the problem cannot be solved by reference to practice, and the international lawyer has to cast about for other tools. But this is to express the position in external terms: really, the lawyer is forced back on his own resources of reason and experience, and is required to make a form of personal assessment, inevitably influenced by his own values and his own perception of the needs of the international community. This process of 'juristic reflection' is a key one in O'Connell's epistemology of international law, indeed in his philosophy of law, and will be referred to again in that more general context. In the 1962 article the method is made clear, but he is not yet ready to press to a conclusion:

There comes a point in the debate, then, when a survey of practice yields no decisive doctrine, and when the issue has to be theoretically abstracted. It may be that the universal succession theorists, whose work came into serious disrepute during the nineteenth century, have more to offer in the way of serious juristic reflection than have their opponents, who had no firmer doctrinal foundation than the concept of sovereignty and the naive belief that facts suffice for intellectual conviction. The jurisprudential factors which influenced the universal succession doctrine may not be so relevant in the contemporary context, but there is great cogency in the thesis that the solution of succession problems by resort to contractual rather than inheritance notions does violence both to juristic tradition and to the requirements of justice, and it is difficult to resist the implications of Jenks's argument, whatever analytical difficulties it presents, that the sociological achievement of a complex interlocking conventional system cannot be squandered through conservative reliance upon irrelevant political history and immature notions of the role that treaties play in an advanced society.

Clearly we are at a turning-point in doctrine. Decisions about succession will be made increasingly by new States in the next few years, and the evidence will accumulate. But the decisive factors will be the guidance that jurisprudence can

<sup>1</sup> This *Year Book*, 38 (1962), p. 105. Cf. his parallel treatment of the (by no means identical) French colonial history: *ibid.*, pp. 105-13.

<sup>2</sup> *Ibid.*, p. 179.

offer in formulating the conceptual problem, and the resistance that doctrine can oppose to political convenience. The new States are clearly bewildered, because they have early recognized that the question of treaty continuity is not just a question of dismantling the incubus of imperialism, but a question of survival of their own economic and technical position in a competitive world. And it is worth repeating that collisions on the question of continuity occur more frequently between the successor States themselves than between them and their former rulers, who have tended, for want of immediate interest, to disengage themselves from the issue. State succession, therefore, is pre-eminently the field of law susceptible of being moulded to the needs of new States. Only intense and scientific study on the part of jurists can ensure that the process will not be subjected entirely to political hazard, but will reflect doctrinal integrity.<sup>1</sup>

This passage is notable for its indecisiveness, but also for its tacit revision of the conclusions reached in *The Law of State Succession* (1956), where, as we saw, universal succession was rejected virtually unargued.

The second article deals with the difficult and diffuse problem of treaty succession in the case of unions, federations and the like.<sup>2</sup> There are several distinct difficulties in analysing these types of union. First there is a problem of terminological confusion, since the terms 'federation', 'confederation', 'real' and 'personal' union and so on are used to describe a wide variety of situations, not always consistently. Moreover, constitutional unions are always subject to political and legal development, centrifugal or centripetal, which makes the use of labels even more hazardous. Secondly, in cases of succession resulting from constitutional union of whatever description, there is often a considerable degree of administrative and social continuity; the local legal order may well survive virtually untouched, though subject to gradual change as a result of later central legislation. In such circumstances there is a tendency for some degree of treaty continuity, often very considerable, to be assumed or asserted, but it is usually quite unclear exactly how this continuity was achieved.

Again, O'Connell's technique is simply to assume that continuity in these cases is established by operation of law rather than by novation or estoppel (though these are accepted as subsidiary means),<sup>3</sup> and to attempt to account for this survival by inferring a rule based on the juridical nature of constitutional unions. But first it was necessary to exclude the argument that treaty continuity in these cases depends upon some form of continuity of legal personality. This is done in cavalier fashion:

A legal person is an actor competent in law to do certain acts; 'personality' is a shorthand word to refer to competence in respect of those acts. When it is said that a State in a federation is an international person, all that can be meant is that it is capable of international transactions within the areas of power in which it is

<sup>1</sup> Ibid., pp. 179-80.

<sup>2</sup> 'State Succession and the Effect upon Treaties of Entry into a Composite Relationship', this *Year Book*, 39 (1963), pp. 54-132.

<sup>3</sup> Cf. *ibid.*, p. 129.

competent. It certainly cannot mean that it is universally competent. Since treaty-making capacity ordinarily presupposes internal competence to legislate to secure conformity to the treaty obligations on the part of officials and citizens, the conclusion must be that the international competence of the States follows the distribution of powers internally. Hence, if the treaty concerns bankruptcy, the only question is: Are the States competent to legislate in the bankruptcy field? If bankruptcy is an exclusive federal power, the fact that the States may exchange embassies is irrelevant . . . Clearly, there are so-called federations in which the personality left by the constitution to the constituent States is so vestigial as to make the cases practically indistinguishable from cessions or annexations; in such cases, accordingly, this capacity, or rather lack of capacity, in the constituent States at the international level, cannot be irrelevant. But does it follow that the States, to retain their treaties, must be competent to make similar treaties themselves? If it does, then few federations are distinguishable from cessions or annexations. Reference to the 'international personality' of the States, far from assisting the solution of the problem, complicates it by begging the question; for hidden in the word 'personality' is an assumed definition which is nothing more or less than the conclusion to the argument being pursued. If an author chooses to interpret personality as meaning capacity to contract, and predicates continuity of treaties upon personality, then he will argue that treaties survive only if the States retain the treaty-making power; and if he chooses to interpret it as meaning capacity to legislate to carry out the treaty internally, then he will argue the irrelevance of the treaty-making power.

Clearly the approach must be from another angle . . . and it must take into account sociological as well as juridical factors. It must conceive of a federal society as a dovetailing rather than a supersession of legal orders, so that the competence to transact and the competence to perform exist conjunctively in the total legal order at the international level, but exist disjunctively in the instrumentalities of government at the constitutional level.<sup>1</sup>

Solutions based on novation or continuity of personality having been excluded, an alternative approach is developed at two levels. In the first place, a proposal derived from the general characteristics of federation is suggested. This combines a particular view of the category 'federation' with O'Connell's general theory, by now fairly well developed, of the relation of international and municipal law, a theory he refers to as 'harmonization'.<sup>2</sup>

The thesis that the treaties of the States survive so long as the States remain competent in the appropriate areas of power until the federal government chooses to exercise its powers in a contradictory fashion, seems . . . to be supported by the basic premiss upon which the potential conflict of international with municipal law is most satisfactorily resolved. It also implies that contradiction can only occur when the legislative regulation of the subject-matter of the treaty is concurrently within the jurisdictions of the federal and the State instrumentalities: when the subject-matter is exclusively within the area of power of the States, the federal legislature may not create contradictory law, and moreover

<sup>1</sup> This *Year Book*, 39 (1963), pp. 56-8; cf. at p. 79 where 'personality' is dismissed as an 'imprecise notion'.

<sup>2</sup> See *International Law* (2nd edn., 1970), vol. 1, pp. 49-54, 79, for O'Connell's notion of 'harmonization'. For its influence in the context of State succession see below, p. 27.



would be incapacitated from performance of its own treaties which call for action contradictory to such State treaties; when the subject-matter is exclusively within the area of power of the federal government a logical conclusion would be that the treaties of the States affecting this area of power lapse because the States lack the capacity to perform. But the last is not the only possible logical conclusion, for it could be cogently argued that the federal power ought to ensure performance of treaties of the States when the States lack such power; this would involve, not a succession to the treaty as such, for the *Teilordnungen* remain identical, but an internal succession of instrumentalities competent to execute the treaty. On this issue the practice is indecisive.<sup>1</sup>

Diverse cases of constitutional unions are then examined without adding much to this conclusion.<sup>2</sup> Equally, in the case of dissolution of federations or other unions,

The presumption . . . is that treaties which are compatible with the transformation of the respective legal orders survive the change, and that each of the successor States remains a party thereto . . . [T]he more important consideration is the sociological one that the territory and people of the successor States are, though now partitioned, identical with those originally affected by the treaty. The resultant presumption of continuity is one not easily rebutted.<sup>3</sup>

But, conceding the sociological considerations, there are difficulties in the way of this form of solution. An initial problem is that 'personality', having apparently been excluded, tends to return under another, not obviously preferable, guise ('internal competence'). To replace personality with legal competence under municipal law seems to involve equating international personality with the legal order of the State, which is incorrect. It also inevitably confuses situations of treaty continuity with those of treaty succession, proposing a single rule when in reality there may be several distinct rules or techniques. For example, the case of the German Empire in 1871<sup>4</sup> seems to be treated as one of continuity, in which case the 'personality' argument returns. But in a situation of genuine succession (such as Nigeria<sup>5</sup>) it is a strange rule of succession which is predicated upon the internal distribution of power of one party, enabling the successor (but, presumably, not the third State) to abrogate the treaty legislatively. The theory of contingent repeal might make sense as an application of *rebus sic stantibus* in a situation of continuity of local personality: it seems much less appropriate as a rule of succession.<sup>6</sup>

A further difficulty is the failure to distinguish treaties requiring legislative action from those which can be performed executively. In practice in most federations the central polity is the exclusive agency for the conduct of international relations; even if the constituent States retain some formal or residual power, this is unlikely to be exercised except with

<sup>1</sup> This *Year Book*, 39 (1963), at pp. 58-9.

<sup>2</sup> *Ibid.*, pp. 60-97.

<sup>3</sup> *Ibid.*, p. 117.

<sup>4</sup> *Ibid.*, pp. 60-77.

<sup>5</sup> *Ibid.*, pp. 93-5.

<sup>6</sup> In such a case it yields the proposition that the successor State is bound by the treaty until it decides (by a legislative act) that it is not. Why legislation rather than an executive decision is required is not explained.

the consent or through the medium of the central agency. In that case if the central agency is not bound to a treaty requiring only executive action by some rule of succession, it is hard to see how the treaty can survive; if it is so bound then on what basis can it legislate inconsistently with the treaty?<sup>1</sup> Once this is conceded, the position would seem to be that 'legislative' treaties survive until abrogated but 'executive' ones do not—a very much less general rule of continuity than that proposed.<sup>2</sup> And the survival is so precarious that it can hardly be described as survival of a treaty regime.

Perhaps because of these difficulties, and no doubt influenced by the uncertainty of the practice and the inherent problems of classification, O'Connell then suggests, at the second level, a more general principle to underpin and support the proposal for continuity in the case of constitutional unions.

What becomes evident . . . is that practice resists the constructions imposed by the presumption that all personal treaties lapse upon annexation or cession, and the criterion for distinguishing the cases examined from cases of simple cession or annexation is even more elusive at the end of the inquiry than it appeared to be at the beginning. Reason, then, seems to compel one to abandon the presumption, and to acknowledge that there was more wisdom in the universal succession theory than has hitherto been admitted. This is not to suggest that the doctrine of State succession with respect to treaties should be one of general inheritance irrespective of the circumstances or of the types of treaty involved. The suggestion is that there should be a presumption of continuity of treaties in all instances and types of State succession, but that each treaty should be examined in its context to ascertain whether this presumption is applicable or not. It is, in fact, basically a question of treaty interpretation; but interpretation itself yields no results unless it is guided by a presumption of continuity. How, for instance, is one to conclude that the expression 'British subject' is to be construed as 'Nigerian citizen' unless there is this presumption?

The result of the interpretative approach would be to exclude many, indeed most, treaties from an inheritance rule in the classical examples of annexation or succession; and to require inheritance in the cases of the formation or dissolution

<sup>1</sup> Even if internal legislative rather than international executive competence is the criterion, in most federations the central polity has both (though the legislative power may be concurrent). O'Connell consistently misstated or underestimated the extent of the treaty-implementing power in the Australian federation (Commonwealth Constitution, s. 51 (xxix)). Thus he states that 'in Australia the fundamental question is whether the power of the Commonwealth Parliament to legislate with respect to external affairs involves power to legislate to implement any and every treaty, or whether the power to implement is only coincidental with other stated federal powers' (ibid., p. 83, repeated in *State Succession in Municipal and International Law* (1967), vol. 2, p. 63). But if one thing is settled about s. 51 (xxix) it is that it is *not* limited to legislative implementation on subjects otherwise within power: *R. v. Burgess, ex parte Henry*, (1936) 55 C.L.R. 608. What is uncertain is whether s. 51 (xxix) extends to cover *all* treaties (bona fide entered into, whatever that may mean), or whether some intermediate position can be formulated. Probably the position approximates to the broad interpretation; at any rate, few of the limitations suggested so far would be likely to cause problems in practice. What is clear is that O'Connell took a very restrictive view of the power; e.g. this *Year Book*, 39 (1963), pp. 85, 91, 94, 96, but cf. p. 110. *Exactly* what his position was is, however, much less clear.

<sup>2</sup> The distinction between 'legislative' and 'executive' treaties is, however, an illusory or at least a relative one, depending on the municipal law effect of entry into treaties, the pre-existing law, and so on. It certainly does not provide a workable criterion for continuity.



of composite States. Once the presumption is positive and not negative, the criterion for distinguishing formation of composite States from other types of State succession crystallizes readily. Treaties affecting areas of power in which the constituent governments are autonomous tend not to produce obligations inconsistent with central policy; such treaties, upon interpretation, are susceptible of performance in the regional context, and hence they survive.<sup>1</sup>

The extent to which O'Connell had departed from his early views of the matter is further demonstrated in his re-examination of the proposition (to which, as we have seen, he adhered in 1956) that 'the question of State succession to treaties is a question more of treaty interpretation than of the existence or otherwise of general rules of law concerning the fate of treaties upon change of sovereignty'.<sup>2</sup> After conceding the need for contextual interpretation and the practical importance of issues of interpretation, he denies the validity of his earlier thesis:

. . . recognition of the importance of treaty construction, and of the need for caution in approaching concrete instances, must not obscure the fact that in many situations the solution cannot lie in the canons of interpretation, and must be sought in a more extensive frame of reference which customary law alone can provide.

This approach from the position of literal interpretation has its obvious attractions, but it begs the question of state succession to treaties. If the treaties are heritable, then the reference to 'His Majesty's subjects' or to 'His Majesty's territories' is immaterial, for it must be regarded as a denomination of the individuals or the territories, and not a classification of their legal status. . . . When France became a republic, the expression 'subjects of His Most Christian Majesty' was interpreted, without quibble, to mean citizens of the French Republic, on the basis that succession of government has no effect upon treaty commitments. If the rules of international law respecting the fate of treaties are identical in the cases of succession of states and succession of governments, then the same process of reconstruction of the relevant expressions is mandatory. Therefore, non-succession to the treaty cannot be deduced from a literal interpretation of the legal status of the persons and territories designated, and interpretation is decisive only when the general inapplicability of the treaty provisions, as distinct from the inapplicability of the legal description of the actors or beneficiaries, is established.<sup>3</sup>

And in his last general discussion of the problem before the publication of *State Succession in Municipal Law and International Law* (1967), he called for a 'new look' at it, announcing what was in effect his conversion to a position of general succession.

It now becomes evident that we must take the juridical bull by the horns and propose that succession should be the rule and non-succession the exception, in cases of independence of nonmetropolitan territories. The arguments favoring it

<sup>1</sup> Ibid., pp. 130-1.

<sup>2</sup> 'State Succession and Problems of Treaty Interpretation', *American Journal of International Law*, 58 (1964), pp. 41-61 at p. 41.

<sup>3</sup> Ibid., pp. 41-2.

are the localization of treaties by specific act: the autonomous administrative character of the territories that makes for legal continuity upon independence; the dubious validity of the whole thesis of 'personal' and 'dispositive' treaties as applied to secession; and the virtual irrelevance of the distinction, save in form, between state succession and government succession. Add to these the important consideration that succession to treaties was argued for by the great majority of jurists until well into the nineteenth century. The argument against succession is that new states cannot be expected to tolerate the surviving encumbrances of imperial government, but, apart from the fact that we have already rejected the cogency of a political solution that offends juristic logic, the argument is much weakened by the fact that in most instances burdensome treaties can be got rid of quite conveniently by the ordinary processes of treaty law.

There is, however, one final and important point to be made, and that is that not all independence movements involve a straight transfer of authority from an imperial government to colonial territories. We have witnessed the process of federation of newly independent states and the dissolution of the federation. This is likely to continue. To make treaty operations dependent upon the hazards of political flux of this sort is to add to the confusion of the problem. The important factor to be emphasized is continuity, not chaos.<sup>1</sup>

## (2) *State succession in respect of matters other than treaties*

The development had been remarkable, and one might expect it to have been paralleled in his work on non-treaty succession. That there was a considerable development here the 1967 book makes clear, but O'Connell wrote comparatively little on these problems between 1956 and 1967, and the development is less easy to trace.

Virtually his first published work was on these aspects of succession—a number of articles in this *Year Book* which Lauterpacht, in his dual capacity as supervisor and editor, thought was the best way of working towards a doctorate.<sup>2</sup> These articles were included virtually verbatim in *The Law of State Succession* (1956), and it is enough to summarize the position set out there.

In the same way as he did for treaty succession, O'Connell rejects almost without argument any notion of universal succession to the legal regime, or to particular legal relations.<sup>3</sup> That leaves open the problem of how those issues are to be dealt with, and how the nineteenth-century precedents, many of them admittedly assuming some version of universal succession, can be employed to support some other position. The solution is found in

<sup>1</sup> 'Independence and Problems of State Succession', in W. V. O'Brien (ed.), *The New Nations in International Law and Diplomacy* (1965), pp. 7-41 at p. 25. Also during this period see his 'State Succession to Treaties in the Commonwealth—A Reply', *International and Comparative Law Quarterly*, 13 (1964), pp. 1450-3, and 'New Zealand in the Law of State Succession', in J. F. Northey (ed.), *The A. G. Davis Essays in Law* (1965), pp. 180-94.

<sup>2</sup> 'The British Commonwealth and State Succession after the Second World War', this *Year Book*, 26 (1949), pp. 454-63; 'Economic Concessions in the Law of State Succession', *ibid.*, 27 (1950), pp. 93-124; 'Secured and Unsecured Debts in the Law of State Succession', *ibid.*, 28 (1951), pp. 204-19.

<sup>3</sup> *The Law of State Succession* (1956), pp. 77-8, 100, 130, 138, 147, 269; and cf. above, p. 3.

the notions of acquired rights and unjust enrichment, which are used more or less interchangeably to establish a form of *de facto* succession based upon equity.

The legal relationship which existed between the predecessor State and the person to whom it owed a duty is something more than a mere *vinculum juris*; it also gives rise to a certain state of facts. Should the predecessor State have borrowed money, for example, two things are created. There is, first, the juridical link between the parties, which exists until either the money is repaid or the State itself has disappeared. There is, secondly, the factual situation which consists in the actual detention by the State of money in which the lender has an equitable interest. When the debtor State is superseded the legal duty to repay this money is not inherited *ipso jure* by its successor. What is 'inherited' is the state of facts which the now extinguished legal relationship has brought about. The equitable interest which the lender has in this factual situation is described variously as an 'acquired right', 'property right' and 'vested right'. The obligation of the successor State is to respect this interest. It is not an obligation derived from the predecessor, but one imposed *ab exteriore* by international law. It arises when the successor, through its own action in extending its sovereignty, becomes competent to destroy the title-holder's interest. The general principle in which this obligation is embodied, and which underlies the whole problem of State succession, is the principle that acquired rights must be respected.<sup>1</sup>

The rest of the work is an exercise in applying these principles to the different situations which arise in cases of succession: economic concessions,<sup>2</sup> administrative contracts,<sup>3</sup> the national debt,<sup>4</sup> local debts,<sup>5</sup> pensions and salaries<sup>6</sup> and unliquidated claims.<sup>7</sup> Thus 'private law interests arising out of contractual relations with the State are regarded by international law as no different in their essential character from tangible interests'. In an executed or partly executed contract 'the private contractor has an acquired right to the extent of his investment', which survives a change of sovereignty.<sup>8</sup> The same considerations apply to the national debt in cases of total succession: 'what is left is the creditor's equitable interest in the money advanced',<sup>9</sup> and the standard of compensation is 'the value of the creditor's investment at the moment of change of sovereignty'.<sup>10</sup> As for local debts,

There has never been any doubt that a successor state is under an obligation to respect those debts incurred in the ordinary routine of governmental administration in the territory acquired by it. . . . Change of sovereignty does not affect the

<sup>1</sup> Ibid., p. 78; cf. pp. 99-104.

<sup>2</sup> Ibid., pp. 106-35.

<sup>3</sup> Ibid., pp. 136-44.

<sup>4</sup> Ibid., pp. 145-73.

<sup>5</sup> Ibid., pp. 174-82. For problems of repartition of debts, *ibid.*, pp. 183-92.

<sup>6</sup> Ibid., pp. 193-200.

<sup>7</sup> Ibid., pp. 201-97.

<sup>8</sup> Ibid., pp. 136-7.

<sup>9</sup> Ibid., pp. 146-7.

<sup>10</sup> Ibid., p. 149. In the case of partial succession the original debt relationship survives, and there is not yet a positive international law rule requiring partition of responsibility (p. 159), though such a rule 'is in the process of crystallization' (p. 167).



juridical character and existence of local government bodies in ceded or annexed territories, and hence debts contracted by such bodies, and the legal relationship between debtor and creditor remain intact. The creditor's interest is thus an acquired right which can be enforced against the debtor and which must be respected by the successor State.<sup>1</sup>

On the other hand, unliquidated, as distinct from liquidated, claims are not 'acquired rights' and the principle of unjust enrichment has no application.<sup>2</sup>

Finally, there is a rather categorical discussion of the effects of succession on public institutions such as the legal system, public property and the civil administration, and on nationality. Here the rather general civil law distinction between public and private law operates as a universal solvent, and the nature of the subject-matter precludes the application of the principle of acquired rights. Public law, as distinct from private law, lapses upon a change of sovereignty;<sup>3</sup> the judicial system, as part of the public law, also lapses.<sup>4</sup> Public property passes,<sup>5</sup> but civil service contracts automatically lapse.<sup>6</sup> Most importantly, in contrast with the very direct role attributed to international law in the protection of private acquired rights, 'international law can have very little to say upon the question of change of nationality consequent upon a succession of States', and there is neither automatic transfer of nationality nor any duty on the successor to grant nationality.<sup>7</sup>

In conclusion, the notion of equity is 'the key . . . to the entire problem of State succession . . .'.<sup>8</sup> A pattern favourable to succession 'has been established by treaty, legislation and other instruments that is surprisingly consistent, and must be regarded as of juridical significance'.<sup>9</sup> The key concept of unjust enrichment is one possessing 'juristic autonomy', and is not merely 'part of the ideological superstructure of outmoded Western society . . .'.<sup>10</sup>

The treatment of acquired rights and its application to the diverse problems of non-treaty succession won considerable praise. There were, however, problems lurking behind O'Connell's apparently straightforward and relatively rigorous account of the role of international law in the protection of private interests after change in sovereignty, as he came to see. A further unsettling factor was his subsequent re-examination, in

<sup>1</sup> *The Law of State Succession* (1956), pp. 180-1.

<sup>2</sup> *Ibid.*, pp. 201, 207.

<sup>3</sup> *Ibid.*, pp. 211-16.

<sup>4</sup> *Ibid.*, pp. 216-25. This is something of a conundrum, in that it might be difficult to conceive of private law continuing if there are no courts to administer it.

<sup>5</sup> *Ibid.*, pp. 226-35. Doubt is expressed about the passing of extraterritorial property on a partial succession: p. 232.

<sup>6</sup> *Ibid.*, p. 238 (though accrued salaries etc. may be acquired rights and thus protected: pp. 193-200, 240).

<sup>7</sup> *Ibid.*, pp. 247, 249. The *Nottebohm* case, *I.C.J. Reports*, 1955, p. 4, is not cited.

<sup>8</sup> *The Law of State Succession* (1956), p. 268.

<sup>9</sup> *Ibid.*, p. 273.

<sup>10</sup> *Ibid.*, pp. 273, 274.

the context of treaty succession, of the positive or universal theories of treaty succession. Almost the whole treatment of acquired rights was conditioned on the assumption that legal relations, especially contractual relations, did not themselves survive.<sup>1</sup> But if one accepted, as O'Connell came to do in his re-examination of treaty succession, some presumption of continuity of obligations, the rejection of any such continuity in the case of internal relations might be questionable.

Apart from an early comparative account of municipal law notions of unjust enrichment,<sup>2</sup> there is little indication of the way in which his thinking on these topics developed before its final reformulation in *State Succession in Municipal Law and International Law* (1967).<sup>3</sup> The abstract correctness of some form of universal succession was conceded in 1965, but even then it was followed by the admission that no such subrogation was accepted in practice, and the result is the same as that suggested in 1956.

The negative theorists denied that there could be any transmission of rights and obligations under governmental contracts upon a change in sovereignty. The universal-succession theorists contended that there was such a transmission. It has been assumed that the latter were patently wrong in their opinion, but juristically, and not taking practice into account, there was no doubt that their thesis was cogent, for subrogation in contractual rights and obligations is a doctrine well understood by municipal lawyers, and obviously apposite for the solution of problems of state succession. When we turn to the practice, we discover that such a subrogation is not admitted, though it has occurred, but also that a complete repudiation of all liability under the contract on the part of the successor state is rare and to be explained on grounds of exception. The middle-of-the-way solution seems to have been to admit that, upon a change of sovereignty, one of the parties to the contract has disappeared from the place of the performance, that the contract as such lapses from 'frustration' but that the benefit to the private contractor under the contract insofar as it has been performed must be satisfied under the doctrine of unjust enrichment. This is a solution suggested by the comparable problem under both English law and the civil law. The result is that the government is released under the contract, but must pay the contractor whatever is due to him at the date of change of sovereignty if the benefits of his work accrue to the territory affected. If the contract is totally executory, the matter is at an end altogether.<sup>4</sup>

Moreover the brief discussion here still reflects a very direct view of international law's role in protecting private investment.<sup>5</sup>

<sup>1</sup> Above, p. 14 n. 3, but cf. above, p. 16 n. 9, which seems to strike a different note.

<sup>2</sup> 'Unjust Enrichment', *American Journal of Comparative Law*, 5 (1956), pp. 2-17.

<sup>3</sup> The account in *International Law* (1965), vol. 1, pp. 463-55, follows closely the structure and argument of *The Law of State Succession* (1956), in summary form. The introduction of a reference to the *Nottebohm* case causes no change of view on nationality and succession: pp. 454-5.

<sup>4</sup> 'Independence and Problems of State Succession', in W. V. O'Brien (ed.), *The New Nations in International Law and Diplomacy* (1965), pp. 7-41 at p. 26. The account is, much more than in 1956, a plea for continuity. Both non-succession to delictual responsibility (pp. 31-2) and the public law/private law distinction (p. 32) are doubted, though no clear alternatives are offered.

<sup>5</sup> Cf. *ibid.*, p. 28.

## 2.2. O'CONNELL'S DEVELOPED THEORY OF STATE SUCCESSION

To this already formidable body of scholarly work on State succession, O'Connell added in 1967 the massive two-volume account that at least one reviewer of his earlier work had thought was necessary.<sup>1</sup> Compared with *The Law of State Succession* (1956), there are three major doctrinal changes, but of course the most obvious difference is in the breadth and depth of treatment of the subject-matter, and particularly in the comprehensive account of modern State practice. Unlike the 1956 book, which was based very much on British practice, the treatment is comprehensive, although still recognizably that of a Commonwealth, and common, lawyer. Whatever view is taken of his own proposals, the research and experience reflected in the work make it a major and permanent source of reference. It has the further advantage that the State practice is presented in such a way that the reader can compare for himself the material with the conclusions drawn from it. At times this can give the account a contrapuntal effect (an effect evident also, for rather different reasons, in *The Law of State Succession* (1956)), but it certainly assists in using the book as a work of reference.<sup>2</sup> The concern here, however, is with its value as a work of authority, so something must be said about each of the major doctrinal developments expounded or suggested in it.

### (1) *The distinction between State succession and State continuity*

In *The Law of State Succession* (1956), only slight attention had been paid to the distinction between State succession and State continuity: it was sufficient to rely on Hall's well-known assertion of the priority of the issue of State continuity.<sup>3</sup> It was on this basis that the continuity of the treaties of international protectorates, before and after the establishment or dissolution of the protectorate, was established.<sup>4</sup> Equally, the categories of 'total' and 'partial' succession, dependent as they are on issues of State continuity or termination, were used confidently and without misgiving. The only hint at this stage of any insecurity or uncertainty on the question was the comment that the dissolution of the Confederacy and the resumption of control over its territory by the United States was 'more a succession of States . . . than of governments'.<sup>5</sup>

That this was not simply an eccentric piece of characterization became clear with O'Connell's rejection, in 1963, of the notion of legal personality

<sup>1</sup> Above, p. 5.

<sup>2</sup> An inveterate technique of O'Connell's was to present his own synthesis of a topic or problem first, then to describe the practice, sometimes at considerable length, without much reference back to his introductory statement and without any attempt at a conclusion. This gives some of his work a rather inconclusive character, but in many cases is a fair representation of the 'state of play'.

<sup>3</sup> *The Law of State Succession* (1956), pp. 3-6, citing Hall's *International Law* (8th edn., rev. A. P. Higgins, 1926), p. 114.

<sup>4</sup> *The Law of State Succession* (1956), pp. 28-31.

<sup>5</sup> *Ibid.*, p. 233.



as a key to the solution of problems of succession in cases of political union or federation.<sup>1</sup> No doubt he was impressed by the insecure and imprecise way in which the category 'State identity' had been used to preserve treaty commitments in cases such as India. If treaty continuity in the case of looser forms of union (such as so-called 'personal unions') was preserved by the assumption of continuity of personality, that left the assumption of treaty continuity in the case of more centralized examples of federations and organic unions unexplained. And the difference between a 'personal' and an 'organic' union was often unclear, especially at the time, as the example of the United Arab Republic (1959-62) showed. But the suggestion was only partly developed, with unsatisfactory results.<sup>2</sup>

Indeed, his position on this central issue remained a little unclear. The tendency was to assume that cases of governmental and State succession were to be treated together as governed by the same rules,<sup>3</sup> without jettisoning the categories 'State' or 'government' and the like which depend on, or emanate from, that fundamental distinction.<sup>4</sup> In 1965 he launched a full-scale attack on this traditional categorical assumption:

Whether the Katanga government succeeded the government of Belgium directly or whether it succeeded it indirectly, by breaking away from the Congo, is disputable; whether its continued willingness to associate with the Congo, but on a basis of autonomy, negated its personality as a secessionary is even more disputable. But again, what are the realities? The case of Katanga was hardly distinguishable from that of Israel except in the degree of successful self-assertion, for Israel, like Venus, arose full-fledged, when Britain departed from Palestine, in territory claimed by the Arabs. Looked at from the Egyptian side, Israel is only a pretender to independence, its pretense being constantly, and not ineffectually, challenged by the Arab League. The only factors distinguishing the case of Israel from that of Katanga—and they are factors of degree—are Israel's recognition by a great many states, thus securing for her some guarantee of permanent survival, and the blessing of the United Nations. In contrast, not only did Katanga fail to secure recognition, but her 'secession' occurred within the context of a United Nations endeavour to make the Congo as a whole viable. To treat the one instance as a case of change of sovereignty and the other as a succession of governments, and to base distinctions in the substantive treatment of rights and wrongs upon the difference, is to render the whole issue intolerably artificial.

The concept of 'personality' with its Hegelian overtones, seems to have misled the theorists. Modern jurisprudence has assisted us in recognizing that the word 'personality' does not stand for something, is not descriptive of anything, and cannot be substituted for by a synonym; it is not, in fact, a reflection of some prototype sitting on a cloud somewhere, but merely a shorthand expression indicating the faculties of legal action. Some writers, notably Scelle, have

<sup>1</sup> Above, p. 9.

<sup>2</sup> Above, p. 11.

<sup>3</sup> e.g. 'If the rules of international law respecting the fate of treaties are identical in the cases of succession of states and succession of governments . . .': loc. cit. above (p. 13 n. 3).

<sup>4</sup> There are indications of this new approach in *International Law* (1965), vol. 1, pp. 425-6, but the category 'State continuity' is still applied to cases such as India and (although he denies its continuity from 1938 to 1945) Austria: *ibid.*, p. 424.

suggested that the whole thesis of sovereignty, with which personality is entangled, be discarded, and the idea of governmental competence substituted for it. There is often, even in a case of state succession, no transfer of the plenitude of legal competence, but only of specific faculties. For example, the United Arab Republic left Syria and Egypt alone competent in the monetary field. When the faculties of government are thus partitioned, the line between a succession of states and a succession of governments wears pretty thin.<sup>1</sup>

But the subsequent discussion still conceded the *formal* validity of the distinction.<sup>2</sup> Was this another example of the technique of inducing a presumption in favour of treaty succession by assimilating cases of succession with other cases (including 'succession of governments') in which treaty continuity was assumed? Or was it only an argument that some cases of State succession, as a matter of political reality, are so like the succession of governments within a State that it would be intolerable for the same result (treaty continuity) not to be achieved (even though by formally distinct means)? It seems that, in the end, the latter argument was the dominant one. In the preface to *State Succession in Municipal Law and International Law* (1967), he remarked that:

At the present time [the jurist] is confronted by the fundamental obstacle of a distinction, derived from the post-Hegelian period, between change of sovereignty and change of government, between continuity of States and State succession. The line between these two types of change in some instances wears thin to the point of disappearance, and the placing of a particular instance of change within the one or the other category is often quite arbitrary. To permit the solution of complex political and economic problems to depend on this arbitrary cataloguing is to divorce the law from the actualities of international life. If there is any rubric, therefore, to which one could resort as a touchstone for the solution of all problems of political change over territory it might be this: that the consequences of such change should be measured according to the degree of political, economic and social disruption which occurs.<sup>3</sup>

But it was conceded, as a matter of categories, that '... a conceptual distinction must be made between succession of States and continuity of States'.<sup>4</sup> What was at issue was not the category but the consequences,<sup>5</sup> and thus the traditional structure of the subject was, somewhat precariously, retained.<sup>6</sup>

## (2) *General principles of treaty succession*

The previous pages have shown the extent of O'Connell's rethinking

<sup>1</sup> 'Independence and Problems of State Succession', in W. V. O'Brien (ed.), *The New Nations in International Law and Diplomacy* (1965), pp. 7-41 at p. 11.

<sup>2</sup> Ibid., p. 25.

<sup>3</sup> Vol. 1, pp. v-vi.

<sup>4</sup> Ibid., p. 5.

<sup>5</sup> Cf. *ibid.*, p. 6: 'the question has now arisen whether or not there is any utility in maintaining a rigid distinction between the legal consequences of the one and the other situation'. Also *ibid.*, p. 7: 'the solution of the problem raised by political change cannot be left to the hazard of characterizing the event as a succession of States or a succession of governments'.

<sup>6</sup> Cf. the rather inconclusive account of treaty succession in cases of protection and suzerainty: *ibid.*, vol. 2, pp. 43-53. In his treatment of 'Internal Relations' reliance is often placed on internal legal continuity of State organs or agencies: e.g. *ibid.*, vol. 1, pp. 417-18. For further discussion see



of the problems of treaty succession since 1956. It is surprising that he nowhere clearly acknowledged how far he had come, not because he was not clear about the direction of his ideas, but because he never, after his departure from it, clearly described the *terminus a quo*, the character of his early view of treaty succession. In the preface to volume II of *State Succession in Municipal Law and International Law* (1967) he describes the traditional doctrine of State succession as 'facile', and admits that his views may have 'the effect of demolishing the traditional edifice of State succession to treaties',<sup>1</sup> but he gives no indication that his description must apply equally to his own early statement of the law, which fairly accurately stated that 'traditional doctrine'. Rather, he believes that he has 'not departed fundamentally from the thesis expounded' in 1956; in the matter of treaty succession this is not so. Not only in its vastly expanded coverage (386 pages compared with 59) is volume II a new book.

It is not possible here to give a complete account of the work. It will be found useful again and again in uncovering some unfamiliar aspect of practice, or in elucidating particular problems or issues (not only problems or issues of State succession). The mastery of sources, and especially of doctrine in German, French and English, is complete. Like most of his work, though the solutions offered may be subtle or complex, the approach, the method of exposition are clear, forceful and direct. He never worried about expressing strong convictions in plain language. Nor is there any attempt to hide what are in truth personal assessments or philosophical convictions behind language of apparent studied objectivity. These features give the sections of the text involving argument and reflection (rather than description) a distinctive and personal quality.

As might be expected, there is a single underlying argument to volume II—that *all* treaties are presumed to have survived a change of sovereignty, unless inapplicable according to their terms, or terminated pursuant to the rules of treaty termination, especially the principle of *rebus sic stantibus*. Virtually the entire book<sup>2</sup> is concerned with expounding and elaborating this presumption in particular contexts. Against this underlying presumption the various 'modes' of succession usually distinguished—total and partial succession, annexation, merger, dismemberment and so on—cease to be determining factors and become merely indicators as to the application of the presumption. The same is true of accepted 'categories' of treaty: the apparent distinction between 'real' and 'personal' treaties loses its autonomy, and 'dispositive' treaties become merely the hard core of heritable treaties pursuant to the general and

Crawford, *The Creation of States in International Law* (1979), pp. 27–30. See also below, pp. 31–2. O'Connell discussed the history of the problem in an interesting paper, 'State Succession and the Theory of the State', in C. H. Alexandrowicz (ed.), *Grotius Society Papers 1972. Studies in the History of the Law of Nations* (The Hague, 1972), pp. 23–75, which demonstrated his mastery of the literary sources.

<sup>1</sup> Pp. v, vii.

<sup>2</sup> Except chapter 22 (pp. 382–6), which denies the possibility of succession to a state of war.

flexible criteria of suitability and termination. The following passage (new to the 1967 book) makes this general approach clear:

The negative theorists sought in the distinction between personal and dispositive treaties an absolute canon for determining the occasions when treaties lapse or survive. In fact the canon is absolute, if at all, only on those occasions when the change of sovereignty involves the maximum disruption of the legal order, and when it becomes necessary to determine the minimum of treaty survival. The mistake of the negative theorists is that they transformed into an inflexible principle of law what could at the most be no more than a presumption that treaties have lapsed because they are irrelevant in the changed context; and then sought to apply this principle indiscriminately in all situations which they chose to characterize as instances of change of sovereignty. The real question is the extent to which a treaty loses its effectiveness in the changed situation. If it be presumed that treaties in principle survive the change of sovereignty, as they survive the change of government, a wider spectrum of treaties is likely to be excluded from lapse on frustration than if the contrary be presumed; and the presumption might well vary according to whether the case is characterized as one of annexation, cession, federation, secession or independence. When the contracting State totally disappears as an administrative entity, it is likely that a wide range of treaties would cease to be performable in the changed circumstances, and the presumption might be against treaty survival. But when the change of sovereignty modifies the circumstances of performance only slightly, if at all, the presumption will be reversed.<sup>1</sup>

Thereafter, assumptions or instances of continuity in particular cases such as the older Dominions, the formation of unions (such as the United Arab Republic) and federations (such as Germany) can be used both to demonstrate how this presumption operates and to support it as a matter of State practice. In those cases no such general rule or presumption may have been explicitly relied on, but by an aggregation of examples against a background of theory such a rule can be inferred.

If the ordinary rules of international law concerning termination of treaties are applied in the several contexts of annexation, cession, independence or union, a diversified but coherent pattern emerges. But until each treaty is examined in the new context the effect of the operation of these rules cannot be gauged. Caution is therefore necessary in the enunciation of comprehensive policies, and reticence with respect to each treaty is required . . . The correct diplomatic stance in modern times is for successor States to serve notice of termination on the other parties in respect of those treaties which are no longer useful, and to initiate negotiations for the termination of those which are on their face interminable and which are embarrassing. In this way all parties know where they stand, and policies can be framed accordingly; a great deal of domestic legislation is not rendered unclear in its operation; and the minimum difficulty is created for the administrative machine. There will be cases where successor States will not succeed in negotiating themselves out of interminable treaties, but these are likely to be the very cases in which non-succession will in any event be contested. It is better to

<sup>1</sup> *State Succession in Municipal Law and International Law* (1967), vol. 2, pp. 2-3, and see the whole passage to p. 6.

leave this small residue to the solution of impossibility of performance upon interpretation, and terminate other unwanted treaties in an orderly and technical fashion, than to demolish a whole universe of conventional arrangements merely to gain a dubious initiative in the event of disputed succession.<sup>1</sup>

Probably, all theories of succession must be founded in some general view of the State, and of the relations between, on the one hand, the State and its internal legal order and, on the other, that legal order and the international legal order of the community of States. O'Connell would have agreed: in his case, the relation between the State and its internal legal order is intimate; so too, it follows, is the relation between international and municipal law. Both contain distinct or discrete positive elements which may not be shared, but both partake of some essential unity of law. At least, some such idea is implicit in much of his work:

The principal requirement for continuity at the international level is continuity at the constitutional level . . .<sup>2</sup>

It is true that international law predicates succession or non-succession upon continuity or discontinuity of the external legal order; but the external legal order is a reflexion, the obverse, of the internal legal order. In so far as constitutional changes may enlarge the internal legal orders of subordinate territories, so these territories gain status in the eyes of international law.<sup>3</sup>

There is a tendency in the direction of continuity of treaties upon independence of colonial territories which has been evident for some time . . . One of the decisive factors promoting this continuity is the embodiment of imperial treaty relationships in the local and separate legal orders of the dependent territories.<sup>4</sup>

Alternative explanations of treaty continuity which might tend to undercut or exclude this view are rejected. Continuity of legal personality is, admittedly, a factor in cases such as protectorates and looser forms of union, but the notion of 'legal personality' is itself elusive, and reducible to elements contained in the problem of succession in the orthodox sense.<sup>5</sup> The older Dominions cannot be treated as special, since some of the more recent cases have been similar, and no distinction among such recent cases would be acceptable.<sup>6</sup> Jenks's explanation based on the category of law-making or legislative treaties is unsatisfactory, since a treaty is always a contract; no definition of the category is available; it confuses the bindingness of general international law with the problem of treaty succession, and it ignores the fact that the practice of succession extends to bilateral as well as multilateral treaties.<sup>7</sup> Although the category of dispositive treaties is not denied,

the touchstone of survival remains a phantom, in some instances on the point of materialization, in others a suggested presence. This makes it evident that an appreciation of the law can occur only in the process of contemplating concrete instances,

<sup>1</sup> Ibid., pp. 23-4.

<sup>2</sup> Ibid., p. 74.

<sup>3</sup> Ibid., p. 89.

<sup>4</sup> Ibid., p. 113.

<sup>5</sup> Above, pp. 9-11.

<sup>6</sup> Vol. 2, p. 133; and cf. above, p. 8 n. 1.

<sup>7</sup> Vol. 2, p. 5.



and that the attempt to universalize the experience to be drawn from these instances is frustrated by the antiquated constructions imposed by the personal/dispositive dichotomy, from which escape seems to be possible only in reversal of the presumption of non-continuity of treaties upon change of sovereignty.<sup>1</sup>

And the legal difficulties with devolution agreements are such that they cannot be intended to operate in isolation from a *rule* of succession:

It is believed that the devolution agreements are confirmatory of a general succession to treaties under international law, and are intended mainly to put other parties on notice of the successor State's affirmative policy. It may be, however, that the agreements purport to achieve an assignment of a wider spectrum of treaties than would be heritable under customary international law. In this event the consent of other parties, express or tacit . . . , is necessary for the assignment to be effective.<sup>2</sup>

O'Connell's concern with arguing for a general rule of succession did not prevent him from discussing in some detail the different administrative and legal techniques adopted in practice for securing treaty continuity. Apart from devolution agreements, he analysed the various forms of unilateral declaration of succession which have become so prominent in practice. His own preferred example was that of Zambia, naturally enough perhaps since it was one of a number of such declarations that he drafted:

. . . the Government of Zambia, conscious of the desirability of maintaining existing legal relationships, and conscious of its obligations under international law to honour its treaty commitments, acknowledges that many treaty rights and obligations of the Government of the United Kingdom in respect of Northern Rhodesia were succeeded to by Zambia upon independence by virtue of customary international law.

Since, however, it is likely that in virtue of customary international law certain treaties may have lapsed at the date of independence of Zambia, it seems essential that each treaty should be subjected to legal examination. It is proposed, after this examination has been completed, to indicate which, if any, of the treaties which may have lapsed by customary international law the Government of Zambia wishes to treat as having lapsed . . .

It is desired that it be presumed that each treaty has been legally succeeded to by Zambia and that action be based on this presumption until a decision is reached that it should be regarded as having lapsed. Should the Government of Zambia be of the opinion that it has legally succeeded to a treaty, and wishes to terminate the operation of the treaty, it will in due course give notice of termination in the terms thereof.<sup>3</sup>

<sup>1</sup> *State Succession in Municipal Law and International Law* (1967), vol. 2., p. 233.

<sup>2</sup> *Ibid.*, p. 371.

<sup>3</sup> Text in I.L.A., *Report of the Fifty-Second Conference* (1966), pp. 590-1. Cf. *State Succession in Municipal Law and International Law* (1967), vol. 2, p. 115. States which he advised at some time or another on State succession included Bahamas, Bangladesh, Barbados, Fiji, Guyana, Mauritius, Papua New Guinea, Tonga, Trinidad and Zambia. For Waldock's comment on the Zambian declaration see *Yearbook of the International Law Commission* (hereafter *I.L.C. Ybk.*), 1969, vol. 2, p. 66.

On the other hand, he was consistently critical of the temporizing or selective declarations made by countries such as Ireland and Tanganyika:

The Nyerere doctrine, in essence, embodies the claim that the successor State is free to determine which treaties it wishes to continue and which it wishes to reject. This raises serious questions concerning the legal basis for continuity during the period of review. Certainly the doctrine operates as notice to terminate those treaties which are terminable on notice, and to this extent it is merely an unusual device of lawful denunciation. But inasmuch as it purports to achieve the termination of treaties which would not lapse on independence and are interminable, it operates only on the principle of tacit consent . . .

Other States must be allowed an equal freedom to pick and choose. And it is likely that in respect of each controversial treaty the other party will adopt the stance that the new State has succeeded to the treaty. This has, in fact, happened. Far from allaying controversy, therefore, the Nyerere doctrine is likely to promote it . . .

The declaration made by Zambia and imitated by Guyana and Barbados aims to avoid certain of these objections: it predicates continuity upon customary international law and not upon unilateral action, and thus aims to attract the commitment of other parties; it has no time limit, and thus avoids the possibility of total lapse; it aims to notify other parties of lapse when, in Zambia's opinion, this has occurred in virtue of customary international law; and it expresses the wish that other parties will continue treaty relationships with Zambia until such notification is received, or until the treaty is terminated by denunciation. At the same time it avoids the argument that Zambia has been assigned treaties which otherwise would have lapsed, in virtue of a devolution agreement with the United Kingdom; and it also avoids the suggestion that continuity is dependent upon such an assignment, the consent to which on the part of other signatories may be difficult to attract.<sup>1</sup>

### (3) *State succession and matters other than treaties*

I have argued that O'Connell's thesis of acquired rights and unjust enrichment in *The Law of State Succession* (1956) was predicated upon a denial of the continuity of legal relations with the State upon a succession. O'Connell's adoption of a form of 'universal succession' with respect to treaties carried implications for his views on non-treaty succession, since if treaty relations are sustained despite change of sovereignty, there might seem no reason why contractual or other domestic legal relations should not also survive in the same presumptive way. Conversely, if contractual relations terminate by a form of frustration (or by the disappearance of a party) there would seem no good reason why treaty relations should not similarly terminate, by virtue of the equivalent treaty rule, *rebus sic stantibus* (or the disappearance of a party). No doubt positive international law might establish continuity in the one case and not the other, but O'Connell was always

<sup>1</sup> *State Succession in Municipal Law and International Law* (1967), vol. 2, pp. 119-22.

scrupulously honest in his characterization of State practice in matters of treaty succession as inconstant and unclear.<sup>1</sup>

The initial surprise in O'Connell's treatment of non-treaty issues in volume I of *State Succession in Municipal Law and International Law* (1967) is that this development did not occur. Instead, a much more subtle view was taken of the indirect way in which international law operates to preserve interests or rights created under municipal law: the result was rather an exposition of the rules of State responsibility after change of sovereignty than an argument for any general rules of succession properly so-called.<sup>2</sup>

The central development in volume I was concisely expressed by O'Connell himself:

It . . . became obvious to me that the problem of the relationship between international law and municipal law in the solution of the legal problems resulting from change of sovereignty was more complex than I had earlier conceded. Indeed the analysis of the matter discloses that international law plays a very restricted role in the matter except with respect to treaties, international claims and protection of foreign investment. For this reason it seemed logical to divide the subject matter into two volumes, the first dealing with problems arising primarily under municipal law and the second dealing with problems arising primarily under international law.<sup>3</sup>

Consistently with this view, the material in volume I is restructured so that the first matter considered is the effect of change of sovereignty on the legal system and the administrative structure of the territory. The problem of continuity of law is treated in a subtle and original way, as a matter of legal philosophy rather than positive international law:

As a matter of historical fact, change of sovereignty has not disturbed, except incidentally, the legal relations *inter se* of the inhabitants of territory affected, or even, in some cases, their relations with the administrative authorities. The explanation of this survival of law goes to the heart of legal philosophy; the theory that law is a concomitant of man's social nature presumed survival of the legal system; the theory that law is a manifestation of the sovereign will—the imperative theory—predicates this survival on the tacit or explicit consent of the successor State.

Some subscribers to the imperative theory of law have been content with the

<sup>1</sup> One possible justification for the apparent disequilibrium between internal and international agreements is that treaties bear a fundamentally different relation to the international legal system from that which contracts do to any municipal system. In an obvious sense this is true; O'Connell was insistent in stressing the sociological importance of the treaty structure. But at the level of theory he consistently emphasized the fundamental importance of general international law, as distinct from treaties which, however important practically, are only contracts between States: e.g. *State Succession in Municipal Law and International Law* (1967), vol. 2, p. 5. For O'Connell's related attitude to codification see below, pp. 43–4, 81.

<sup>2</sup> Cf. Collier, *Cambridge Law Journal*, 26 (1968), p. 147. One obvious exception is the treatment of public property: *State Succession in Municipal Law and International Law* (1967), vol. 1, pp. 199–236. O'Connell takes a rather minimal view of the extent of property which a successor is entitled to claim by operation of law. He adds that 'the extent of the analogy between the case of succession of government and succession of States is not clear' (*ibid.*, p. 209 n. 1).

<sup>3</sup> *Ibid.*, p. vi.



bare proposition that under international law the legal system survives a change of sovereignty, apparently unaware of the need for some explanation of the phenomenon of survival, and in particular of the function that international law may have in directing this survival. Critical minds within the imperative school have pointed out that, unless one conceded a role to international law in directing the solution in municipal courts of the internal problem of municipal law survival, the question of this survival or otherwise is entirely one of municipal law. But since a dualism of international law and municipal law prescind from an imperative theory of law, this concession is unsupportable.

The alternative theory that juridical institutions are spontaneously generated, and that law is a crystallization of a people's pattern of life into norms of conduct, yields the conclusion that legal survival is independent of an intervention of sovereignty; and it also, without denying the intrinsically harmonious connexion of international law and municipal law, does not need to rely on international law to achieve this survival. It considers continuity of law throughout the process of change of sovereignty to result from the nature of law itself, and not from positive direction of either the sovereign or of international law . . . Unless a legislative will to maintain the law is presumed to exist five minutes after change of sovereignty (which is a fiction), it is necessary to presume a retroactivity of the legislative will when manifested. But if this will is never manifested, except by implication, conviction of legislative endorsement of the legal system can grow but slowly. In actual fact, all legal transactions concluded in this twilight period of uncertainty will be founded on the presumption of legal continuity, and the human necessity for regulation and certainty is clearly a more viable intellectual factor than the supposition of a collective will.<sup>1</sup>

As a result, the civil law distinction between public and private law institutions, which was accepted in 1956, is rejected as both rigid and elusive; what matters is 'the extent to which political and administrative continuity is achieved throughout the change'.<sup>2</sup>

The principle of continuity of law is only a presumption, which is displaced by positive legislative enactment, and if the new sovereign evinces the intention to introduce uniform law in the acquired territories this intention will prevail. When political sentiment is acute, the intention of the new sovereign to substitute its law for that of the old is more easily established than when the change of sovereignty is perfunctory.<sup>3</sup>

Sometimes, however, this new material is combined with passages incorporated from *The Law of State Succession* (1956), which are not fully responsive to the conceptual adjustment which has occurred.<sup>4</sup> Perhaps O'Connell did not grasp the full implications for his theory of acquired rights of the contingent and defeasible role international law must assume

<sup>1</sup> *State Succession in Municipal Law and International Law* (1967), vol. 2, pp. 101-4. On the jurisprudential problems of continuity of law cf. Finnis, 'Revolutions and Continuity of Law', in Simpson (ed.), *Oxford Essays in Jurisprudence (Second Series)* (1973), pp. 44-74.

<sup>2</sup> *State Succession in Municipal Law and International Law* (1967), vol. 1, p. 105; cf. pp. 199-201.

<sup>3</sup> *Ibid.*, pp. 107-8.

<sup>4</sup> e.g. *ibid.*, pp. 104, 142, 345.

if continuity of the legal system becomes a hypothesis rather than a rule. No particular problem is presented by private rights or interests, which, if unaffected under the relevant law by the change of sovereignty, retain that degree of international legal protection they had before (apart from questions of nationality of claims).<sup>1</sup> The difficulty arises with legal claims and contractual undertakings *with the State*, and it is here that O'Connell's account may not be fully self-consistent.

In respect of claims against the predecessor State the situation is somewhat different. Such claims may only be pursued against the successor State if the liability has devolved upon it; and it may devolve in virtue of the successor State's own law, or in virtue of international law, or, perhaps, in virtue of both. International law, since it is the only legal system available to regulate the consequences of the international event of State succession, is competent to achieve such a devolution; but even if a devolution occurs, the successor State is only inhibited from adversely affecting the rights of its own national creditors by its own unilateral act in the event of these being protected by its own constitution; in the case of alien creditors, it is inhibited by the ordinary rules of international law concerning contractual responsibility. There are, therefore, three questions to be clarified. First, does the legal system survive change of sovereignty? An affirmative answer to this has already been given. Secondly, does positive international law impose any liability on the successor State in respect of private rights subsisting against its predecessor? To this an affirmative answer will be given. And, thirdly, may the successor State cancel these rights after the change of sovereignty? To this the answer will be given that it may only do so to the extent to which international law permits any State to abrogate rights.<sup>2</sup>

Of course, contractual relations with, or rights against, the State might be preserved by some express stipulation, or the 'State' might be represented in the matter by a separate legal entity whose existence is not disturbed by the change of sovereignty.<sup>3</sup> Apart from this, the question is the basis of any liability the new State has with respect to those relations or rights. As in 1956, the existence of any general principle of *legal* succession is denied: the existence in international law of the notion of absolute inheritance has not been acknowledged by modern scientific research.<sup>4</sup>

. . . subrogation of the successor State in the rights and obligations of the predecessor State is generally indefensible . . .<sup>5</sup>

<sup>1</sup> It has been pointed out (e.g. Brownlie, *Principles of Public International Law* (3rd edn., 1979), p. 654 n. 5) that the well-known *dictum* of the Permanent Court in the *German Settlers* case, *P.C.I.J.*, Series B, No. 6, p. 36, referred to a case in which private interests were in fact maintained under the successor's municipal law. For O'Connell's treatment of the case see *State Succession in Municipal Law and International Law* (1967), vol. 1, pp. 273-5. On nationality of claims in the context of State succession see ch. 22, pp. 537-42 (new to 1967). Both here and generally, O'Connell was very critical of the rule of continuous nationality, which he thought 'offensive to modern conceptions of the role of international law in protecting the individual' (*ibid.*, p. 539).

<sup>2</sup> *Ibid.*, pp. 237-8.

<sup>3</sup> A municipal court called on to decide for itself the question of the continued existence or identity of a State instrumentality after change of sovereignty would no doubt refer to the elements of administrative and political continuity or change referred to by O'Connell.

<sup>4</sup> *Ibid.*, p. 238.

<sup>5</sup> *Ibid.*, p. 239.



It cannot be admitted that an acquired right always persists under the new sovereign on exactly the same terms as it existed under the old. To admit this would be to admit that the legal relationship which existed between the old sovereign and the titleholder has been inherited by the successor State. This is not necessarily the case.<sup>1</sup>

This leads, as in 1956, to a distinction between the legal relation and its factual concomitants. Even if the former lapses through the disappearance of the other party or the operation of rules such as frustration, the latter may still survive:

What the new sovereign does inherit is the fact of the existence of the titleholder's interest . . . Until a successor State legislates to terminate acquired rights . . . these remain in existence as facts. Legislation to abrogate them must therefore be specific and express, and a judge must interpret it strictly so as to maintain in being acquired rights which are not unequivocally destroyed.<sup>2</sup>

This view is then pursued consistently across the various subdivisions of private rights, with a wealth of detail and example. The position is summarized succinctly in a new passage:

The proper law of the contract, which will ordinarily be the law of the predecessor State, should be looked to in order to ascertain if the contract has expired from frustration; in most legal systems the disappearance of the contracting State from the place of performance will have this effect, but if the law of the successor State provides for complete succession the effect will be negated. International law looks to the proper law to determine what it should protect. In the event of frustration of the contract in virtue of the proper law, and as a consequence of State succession, what remains to be protected is the equitable interest that survives the frustration. In civil law systems this interest is governed by the doctrine of unjust enrichment; in the common law it is governed by rules which prescind from the theory of unjust enrichment. Therefore, the successor State will incur, in virtue of international law, the obligation of satisfying the equities created by the proper law, should the contract be frustrated, and the obligation of performance should it not be frustrated. The obligation is owed to nationals of the successor State as well as aliens, in virtue of the capacity of international law to regulate the consequences of the international event of State succession; but only in the case of aliens is there machinery for enforcing the obligation; nationals have no resort beyond local remedies. And this scheme of rules derives from the theory that the legal system of the predecessor State survives change of sovereignty; a proposition which is one of legal philosophy, not one of positive international law.<sup>3</sup>

It is suggested that the difficulty here lies in describing this factual situation as one involving acquired rights. The only 'rights' that could exist (questions of property apart) would be pursuant to the contract,

<sup>1</sup> Ibid., p. 264. In *The Law of State Succession* (1956), pp. 99–100, this passage is the same except for the last sentence, which reads: 'Such a thesis has been rejected.'

<sup>2</sup> *State Succession in Municipal Law and International Law* (1967), vol. 1, pp. 264–5. And see especially ch. 12, 'The Theory of State Succession respecting Governmental Contracts' (pp. 298–303), for a full restatement of the argument.

<sup>3</sup> Ibid., pp. 302–3.

concession or other arrangement, which *ex hypothesi* has terminated. In the absence of some form of subrogation or statutory continuity (and apart from treaty<sup>1</sup>) the new State is simply not privy to any arrangement with the private contracting party or concessionaire, including any arrangement as to the value of work done, amount of damages for breach, etc. It follows that the principle of unjust enrichment can refer only to the extent to which the new State actually is enriched: the extent of the loss of the private contracting party is not itself relevant. In other words, there is a crucial but unperceived distinction between 'acquired rights' and 'unjust enrichment'.<sup>2</sup> In this situation, to measure the latter by reference to the former is to reintroduce a form of contractual succession by the back door, and to deny the initial premisses of the argument.

The difficulty (which is 'inherited' from the 1956 text) is evident in passages such as this:

The standard of compensation in such cases must be the value of the creditor's investment at the moment of change of sovereignty. The doctrine of unjust enrichment in this context is usually rejected because it is argued that proof that the debt has benefited the absorbed territory is impossible. Such proof is not needed. Apart from the fact that there is a presumption of benefit, there is a detriment to the creditor, and detriment, allied with a presumption of benefit is sufficient to constitute unjust enrichment.<sup>3</sup>

The point is that if the new State does not succeed to the contractual enterprise, the valuation of the enterprise under the contract or arrangement (and any associated rules of law) is *res inter alios acta*. What matters, so far as the notion of unjust enrichment is concerned, is the extent to which the new State, or the community it represents, really is benefited unjustly by taking over the 'enterprise'. If there is no benefit, that would not entail rejection of the concept: only that no compensation is in fact payable. The criterion of compensation is thus even more flexible than O'Connell was prepared to admit.<sup>4</sup>

This criticism notwithstanding, there is no doubt that volume I of *State*

<sup>1</sup> It is doubtful whether a treaty would itself effect a novation or assignment of private contractual interests (as distinct from creating a duty on the part of the successor State to bring about that result). Problems both of intention and of the authority of the third State would arise. For the Litvinoff Assignment, which may have had this effect, cf. *United States v. Pink*, 315 U.S. 203 (1942). No doubt a treaty might bring about a direct novation or transfer of rights of the third State itself under the municipal law of the successor, if an intention was clearly demonstrated to this effect and subject to any municipal law requirements of form. For an example see the Agreement between the Netherlands and Australia concerning Old Dutch Shipwrecks, 6 November 1972: *Australian Treaty Series*, 1972, No. 18. Cf. *Robinson v. Western Australian Museum*, (1977) 16 Australian Law Reports 623 at p. 660 *per* Stephen J., pp. 673-4 *per* Murphy J.

<sup>2</sup> Cf. *ibid.*, p. 395, referring to 'the doctrine of acquired rights and its corollary doctrine of unjust enrichment'.

<sup>3</sup> *Ibid.*, pp. 375-6.

<sup>4</sup> In *The Law of State Succession* (1956), p. 268, he argued that: 'paramount in the historical controversies arising out of changes in sovereignty has been an attempt to safeguard the investments of foreign nationals in transferred territory. The starting-point in a discussion of State succession is, therefore . . . the interests . . . of private investors'. The passage is not repeated in 1967, but some such assumption must underlie the equation of detriment with benefit in passages such as that cited.

*Succession in Municipal Law and International Law* is much more subtle and persuasive than the corresponding treatment in 1956. More important, it exposes and develops the issues involved in the protection of private law interests upon succession with a depth and clarity unique in the literature.<sup>1</sup>

### 2.3 *ATHANASIUS CONTRA MUNDUM*: O'CONNELL, THE INTERNATIONAL LAW COMMISSION AND THE 'CODIFICATION AND PROGRESSIVE DEVELOPMENT' OF STATE SUCCESSION

Suitable as it was for extended scholarly treatment of the sort O'Connell had given it, the topic of State succession was not self-evidently 'ripe for codification' at the end of the 1960s, either intrinsically or as a matter of relative priority of importance. In itself it is a rubric containing diverse, diffuse and difficult issues, many of them solvable only by particular reference to the facts of individual cases. Codification was, at this time, likely to be influenced overwhelmingly by the recent experience of decolonization, an experience not necessarily typical of the cases of succession most likely to occur in the future. Various administrative techniques had evolved for coping with discontinuities resulting from succession, and it was arguable that their evolution should be allowed to continue undisturbed by attempts at formulating general rules.<sup>2</sup> As a matter of priorities, other topics on the Commission's agenda raised issues of more general interest, or were more precise and manageable.

None the less, for a variety of reasons the project was undertaken. It is not necessary to describe it in detail here; however, an attempt will be made to outline the way in which the Commission dealt with O'Connell's positions on the various issues, and to describe O'Connell's responses to its work.

#### (1) *The distinction between State succession and State continuity*

Originally, the topic of succession of States was linked with succession of governments on the Commission's list. In the very early stages of the

<sup>1</sup> For reviews, see Spencer, *American Journal of International Law*, 64 (1970), pp. 969-72; Brownlie, *Law Quarterly Review*, 84 (1968), pp. 573-5; Collier, *Cambridge Law Journal*, 26 (1968), pp. 146-8; Dunbar, *Tasmanian University Law Review*, 3 (1968), p. 120. Other matters of interest include a re-examination of the rules about succession to tortious responsibility (pp. 482-93), and an extended account of the effect of succession on nationality (pp. 497-528), which remains, however, especially compared with the treatment of property issues, curiously dualistic.

<sup>2</sup> There was also the logical difficulty of formulating, by treaty, rules to apply to events which must have occurred before any new State affected could become a party to the treaty. This was resolved, in the Vienna Convention on Succession of States in respect of Treaties (A/CONF. 80/31, 23 August 1978: *International Legal Materials*, 17 (1978), p. 1488; hereafter referred to as the Treaty Succession Convention), by allowing a limited and special form of retrospectivity by declaration (Art. 7 (2) and (3)). The effect is to create yet another 'administrative technique' for succession in the case of new States, though under the guise of a general set of rules.



Commission's examination of the topic it was proposed to separate the two and to deal only with issues of governmental succession to the extent that they infringed on questions of State succession.<sup>1</sup> In accepting this proposal the members of the Commission made it clear that the two problems were to be sharply distinguished, and subsequent attempts at eroding the distinction were successfully resisted.<sup>2</sup> In fact the Treaty Succession Convention does not deal at all with issues of governmental succession.<sup>3</sup>

At the same time the Commission was extremely reticent in defining the occasion of succession. Its draft definition, approved verbatim at the Vienna Conference, provides merely that

'succession of States' means the replacement of one State by another in the responsibility for the international relations of territory.<sup>4</sup>

The term 'responsibility for the international relations of territory' was adopted instead of 'sovereignty' so as to include other forms of general territorial administration for some reason not equivalent to 'sovereignty' (such as trust territories and some protectorates). The failure of the Commission to define more specifically when a succession occurs reflects its reluctance to get involved in issues of international personality, a reluctance which is probably justified in view of their variety and difficulty (and of the lack of consensus on some crucial questions). As a result, with one partial exception,<sup>5</sup> issues of State continuity have to be settled prior to and independently of the State Succession Convention.

This may justify the Convention's failure to deal with certain issues (such as treaties of international protectorates and protected States<sup>6</sup>) which can be classified as depending on continuity of personality rather than succession. Much room is left for manipulation of the concepts of personality and statehood to achieve treaty continuity (as occurred in the case of India).

## (2) *State succession with respect to treaties*

The sharp distinctions drawn by the Commission between continuity and succession, State and government, contrast with O'Connell's preference for assimilating and equating the problems. I have argued that this preference was not a result of the categorical rejection of established

<sup>1</sup> *I.L.C. Ybk.*, 1963, vol. 1, p. 189.

<sup>2</sup> Cf. *I.L.C. Ybk.*, 1974, vol. 2 (1), pp. 14-16, 30-1.

<sup>3</sup> Art. 40 excludes questions arising from military occupation of territory, which can involve a form of governmental succession. Otherwise there is no reference to the issue.

<sup>4</sup> Art. 2 (1) (b). For the evolution of the definition see *I.L.C. Ybk.*, 1968, vol. 2, p. 90 ('competence to conclude treaties with respect to given territory'); *ibid.*, 1969, vol. 2, p. 50 ('sovereignty of territory or . . . competence to conclude treaties with respect to territory'); *ibid.*, 1972, vol. 1, pp. 31-43. The present definition emerged from the Drafting Committee in 1972: *ibid.*, pp. 270-1, especially para. 33. For further comment, *ibid.*, 1974, vol. 2 (1), pp. 24-8 (Vallat).

<sup>5</sup> Art. 35, as to which see below, p. 40.

<sup>6</sup> Waldock supported a degree of treaty continuity in the case of protected States: *I.L.C. Ybk.*, 1972, vol. 2, pp. 3-17. But the view was taken that such cases were in some way anomalous and should be omitted: *ibid.*, 1972, vol. 1, pp. 133-41, 145-9. Despite Tonga's objections, the matter was not reopened in 1974: *ibid.*, 1974, vol. 2 (1), pp. 28, 40, 72.

concepts but rather a reflex of his ideas of treaty succession,<sup>1</sup> and it is here that the contrast with the Commission's work appears.

The drafting history of the State Succession Convention is in several respects exceptionally interesting.<sup>2</sup> This is not so much because of its likely importance as a convention<sup>3</sup> as of its interest as a study in the problems of codification. More particularly, the Commission's work went through an evolution which was not only pronounced but was in some respects remarkably similar to O'Connell's own experience after 1952. Its chief interest, in this context, is as a study in the comparative development of international legal thinking.

We have seen that O'Connell's initial thesis rejected the existence of rules of treaty succession in the strict sense: the solution to the problems was to be found in the law of treaties. This led directly to the rejection of automatic treaty continuity upon succession. The 'moving treaty frontiers' rule was itself a product of treaty interpretation, and apparent exceptions, such as boundaries and dispositive treaties, should probably be explained on other grounds.<sup>4</sup> In a very similar way, Waldock began his study as Special Rapporteur with the assertion that

... the solution of the problems of so-called 'succession' in respect of treaties is today to be sought within the framework of the law of treaties rather than in any general law of 'succession'. This view is founded more especially on the modern practice of States, of international organizations and of the depositaries of treaties, though also on doubts as to how far any specific legal institution of 'succession' has been recognized in international law.<sup>5</sup>

O'Connell came to reject this initial position through the examination of two particular categories of succession: new States which became independent through a process of orderly evolution (on the model of the British Dominions), and unions of States (and the related problem of dissolution of unions).<sup>6</sup> At the very beginning of its inquiry the Commission considered the former problem, and came face to face with O'Connell's revised doctrine, the presumption of treaty continuity in all cases including newly independent States. The point was quite clearly articulated in Waldock's Second Report:

In general, the question with which the Commission has to concern itself is ... not so much whether decolonization may constitute a special new form of

<sup>1</sup> Above, p. 20.

<sup>2</sup> It can be traced in the *I.L.C. Ybk.* debates from 1968 to 1974. See in particular the Reports on Treaty Succession of the two Special Rapporteurs, Sir Humphrey Waldock: First Report, *I.L.C. Ybk.*, 1968, vol. 2, pp. 87-93; Second Report, *ibid.*, 1969, vol. 2, pp. 45-68; Third Report, *ibid.*, 1970, vol. 2, pp. 25-60; Fourth Report, *ibid.*, 1971, vol. 2 (1), pp. 143-56; Fifth Report, *ibid.*, 1972, vol. 2, pp. 1-60; and Sir Francis Vallat: First Report, *ibid.*, 1974, vol. 2 (1), pp. 1-88. Kearney, *American Journal of International Law*, 67 (1973), pp. 92-101; *ibid.*, 69 (1975), pp. 591-602, emphasizes the pressure of time under which the Commission worked in producing its draft articles. See also Stewart, *Harvard International Law Journal*, 16 (1975), pp. 638-47.

<sup>3</sup> As at May 1980 there were 21 signatories, and only 2 ratifications (Iraq and Seychelles).

<sup>4</sup> Above, pp. 3-4.

<sup>5</sup> *I.L.C. Ybk.*, 1968, vol. 2, p. 89; cf. *ibid.*, 1968, vol. 1, p. 131. To the same effect, Ruda, *ibid.*, p. 145.

<sup>6</sup> Above, pp. 6-13.



succession as what may be the implications of the principles of the Charter, including 'self-determination', in the modern law concerning succession in respect of treaties. The traditional law on this point—the principle that a new State begins its treaty relations with a clean slate—was certainly consistent with the principle of self-determination, even if in certain respects it may have been inadequate. The question for the Commission will be whether to retain this principle of the traditional law as the underlying norm or to follow the International Law Association and admit a certain presumption in favour of the transmission of the treaties of the predecessor sovereign to a new State.<sup>1</sup>

And in his Third Report, in 1970, he unequivocally rejected the International Law Association's and O'Connell's position:

the majority of writers and the evidence of State practice support the traditional view that a newly independent State is not under any general obligation to take over the treaties of its predecessor previously applied in respect of its territory. Nor does it appear to the Special Rapporteur, despite some recent opinion to the contrary, that on this point any difference is to be made between multilateral and bilateral treaties.<sup>2</sup>

This rejection, embodied in a draft article which became, without substantial change, Article 16 of the Treaty Succession Convention, was a marriage of the 'traditional law' (as expounded, *inter alia*, in *The Law of State Succession* (1956)<sup>3</sup>) with one view of the modern law based upon notions of self-determination. Its effect was to establish the International Law Association's position (and, to the extent that they coincided, O'Connell's position too) as a paradigm of the rejected argument.<sup>4</sup>

What is remarkable is that this rejection, and the apparently sharp conflict between opposing positions, came to be modified by a subterranean process of drafting changes and amendments so that, apart from 'newly independent States' as defined, the Commission's position came to favour treaty continuity in a more rigid and pronounced way than ever O'Connell did, and this by the elaboration of rules of treaty *succession* and by a rejection of the thesis that treaty rules are the key to solving problems of succession.<sup>5</sup> It remained true that there was a marked antithesis between the Commission's and O'Connell's views, but at the end of the day this involved O'Connell's arguing for *greater* freedom and flexibility on the part of successor States, and the Commission (and the Vienna Conference) adopting a more categorical view of '*ipso jure* continuity'.

The Commission's acceptance of rules of succession as distinct from treaty rules began with its adoption, in 1970, of a *right* on the part of newly

<sup>1</sup> *I.L.C. Ybk.*, 1969, vol. 2, p. 50. For references to the I.L.A.'s work see above, p. 2 n. 3.

<sup>2</sup> *I.L.C. Ybk.*, 1969, vol. 2, p. 33. He goes on to reject Jenks's argument about law-making treaties: *ibid.*, pp. 33–4. Elsewhere he rejected the analogy with the British Dominions, as a special case: *ibid.*, p. 36 n. 48; and the related but more general argument about 'localization': *ibid.*, p. 31. But in debate he was slightly less certain: *ibid.*, 1972, vol. 1, p. 25.

<sup>3</sup> Waldock cites the earlier work in support of this view: *ibid.*, p. 32 n. 26.

<sup>4</sup> Despite this, references to O'Connell's work and (even more so) that of the I.L.A. Committee are very frequent. For a tribute to this work see *ibid.*, 1972, vol. 1, p. 24.

<sup>5</sup> For O'Connell's rejection of this view see above, p. 13.

independent States to become parties to multilateral treaties previously in force in respect of their territory, without any requirement of consent of the other States parties.<sup>1</sup> This result might have been achieved by allowing new States to accede rather than succeed, but the rules for multilateral treaties involve a selection of those elements of succession and accession most favourable to the newly independent States.<sup>2</sup> Even in this context, then, the Commission's proposals, though predicated on the 'clean-slate' doctrine, include elements of succession and continuity. Vallat, its second Special Rapporteur, wittily substituted the metaphor of the 'magic cloth'.<sup>3</sup>

What is more significant, however, is the development of rules of treaty succession outside the context of decolonization.<sup>4</sup> The draft articles proposed by Waldock in 1972 allowed for *de jure* succession only in restricted circumstances: apart from boundary and dispositive treaties,<sup>5</sup> he made a rather limited proposal for continuity in the case of formation and dissolution of unions of States. Although critical of the International Law Association's, and O'Connell's, equation of unions of States and of territories,<sup>6</sup> the special Rapporteur was undoubtedly influenced by their position with regard to the former:

the practice as a whole does not give clear guidance as to the rules to be adopted, so that the Commission's task may have in it some elements of progressive development. The first question is whether the same rules should apply to both federal and non-federal unions of States. On this point the Special Rapporteur agrees with the Committee of the International Law Association that the variety

<sup>1</sup> See now State Succession Convention, Arts. 17–22.

<sup>2</sup> Thus newly independent States have a right, but no duty, to notify their succession to multilateral treaties, whether or not they could have acceded to them (Art. 17) and whether or not the treaty was in force at the date of succession (Art. 18). Such States can also rely on the predecessor's signature (Art. 19). Reservations made by the predecessor apply, but the successor may vary those reservations or formulate new ones (Art. 20, and cf. Art. 21 (choice between differing provisions)). Notification of succession brings the treaty into force *vis-à-vis* all parties (including the predecessor State) (Art. 23), but to protect those parties its operation is not, for substantive as distinct from formal purposes, retrospective (Art. 23 (2)).

<sup>3</sup> *I.L.C. Ybk.*, 1974, vol. 2 (1), p. 63. But O'Connell's general presumption retained a degree of support both in the Commission and among States: see below, p. 42 n. 3.

<sup>4</sup> For the definition of 'newly independent State' see below, p. 40.

<sup>5</sup> For the discussion of boundary and dispositive treaties, see *I.L.C. Ybk.*, 1972, vol. 2, pp. 44–59 (Waldock proposes alternative articles emphasizing succession to treaties or succession to obligations created by treaties); *ibid.*, 1972, vol. 1, pp. 247–54, 258–66, 275–6. Generally an extensive view of succession was taken in these cases. In his attack on the majority position Tabibi conceded O'Connell's influence in these matters: *ibid.*, 1974, vol. 1, p. 207. Art. 11 of the State Succession Convention provides that a succession of States 'does not as such affect' a boundary established by a treaty or 'obligations established by a treaty and relating to the regime of a boundary'. This goes beyond the simple proposition that the extent of territory is not changed upon a transfer of sovereignty and supports a form of succession of treaty obligations. Art. 12 provides that a succession of States 'does not as such affect' certain territorial regimes the obligations and rights of which are established by a treaty and are 'considered as attaching' to the territories in question. Similarly, this gives support to a fairly extensive degree of succession of obligations, but carefully avoids the question of the criteria for such regimes. Moreover, the continuity appears to be attributed to the law of servitudes or territorial regimes rather than to the law of treaty succession. Art. 12, para. 3, excludes treaty obligations relating to 'foreign military bases': this was the only addition or alteration made by the Vienna Conference to the two draft articles.

<sup>6</sup> *Ibid.*, 1972, vol. 2, p. 27.

of constitutional forms on which unions rest, with their different gradations of federation, do not make it easy to draw neat distinctions between federal and other unions. Accordingly, if possible, a single solution for unions of *States* may be preferable.<sup>1</sup>

He rejected both the criterion of the continuing international personality, or treaty-making competence, of the constituent States of the union (which is, of course, a 'treaty' rule rather than a rule of succession), and O'Connell's criterion of the constitutional powers of treaty performance, which would result in a contingent, defeasible succession. What was involved was a distinct, binding, succession of obligations:

The question here posed is whether the formation of a 'constitutional' union of States attracts a principle derived from the law of succession of States which displaces the ordinary principle in the law of treaties protecting the priority of an earlier treaty. The evidence it is thought, indicates that it is a point at which principles of succession have an impact upon the principles of the law of treaties. In the first place, the continuance in force of pre-union treaties never seems to have been approached either by States or writers simply from the point of view of the priority to be given to an earlier instrument. Although there may have been some differences as to the criterion which should determine continuity, compatibility in one form or another with the new situation resulting from the formation of the union has been advanced as the relevant criterion. Nor does any distinction ever seem to have been made in this context between a union of States established by treaty and one constituted by other instruments. Indeed, to make such a formal distinction the basis of applying different rules of succession in the two cases could hardly be justified; for a constituent instrument not in treaty form may still embody agreements negotiated between the States concerned. Accordingly, it is believed that, whether the union is established by a treaty or by other instruments, the continuance in force of pre-union treaties must depend on principles of succession . . .<sup>2</sup>

Although he proposed a choice of articles on unions of States, one of them consistent with the 'clean-slate' doctrine, Waldock's own preference was for this general rule of succession.<sup>3</sup> Like O'Connell in 1963, he had been driven to reject his original premiss in dealing with the problem of constitutional unions. But this rejection so far only extended to 'unions of States' in a rather limited sense:

'Union of States' means a federal or other union formed by the uniting of two or more States which thereafter constitute separate political divisions of the united State so formed, exercising within their respective territories the governmental powers prescribed by the constitution.<sup>4</sup>

At the same time, cases of secession or separation from a metropolitan State were dealt with, in the same way as the independence of a 'dependent

<sup>1</sup> *I.L.C. Ybk.*, 1972, vol. 2, p. 29 (emphasis his).

<sup>2</sup> *Ibid.*, p. 31 (para. (48)); cf. para. (45).

<sup>3</sup> *Ibid.*, pp. 29-32, especially para. (41); and cf. Draft Art. 20 ('Dissolution of a union of States'), offered in parallel alternatives: *ibid.*, pp. 35-9, especially para. (13).

<sup>4</sup> Draft Art. 2 (1) (h); *ibid.*, p. 18.



territory' as a newly independent State, by the application of the clean-slate principle.<sup>1</sup> The rules of succession proposed as one alternative solution to the problems of constitutional union and dissolution of unions were thus an exception to proposals generally supporting non-succession.

The question of unions and dissolution of unions was not reached until relatively late in the Commission's 1972 session (Waldock's last before taking his seat on the International Court). Although the majority opinion on the Commission favoured the first alternative article (involving *ipso jure* succession), there was immediate criticism of the category 'union of States'.<sup>2</sup> In addition, how was it possible to distinguish dissolution of a union from separation of a constituent State?<sup>3</sup> In face of this criticism, Waldock adhered to the continuity rule, and raised the question of its extension:

It was clear that the former practice had accorded significance to the element of separate international personality. But that element was absent in the cases of the UAR and Tanzania, at least on paper, and that had led the International Law Association to disregard it as a basis for formulating the rule. . . . The International Law Association seemed rather to give significance to the possession by the constituent parts of power to *implement* the treaties. But that went too far in introducing internal law into international law. In his opinion, it would be for the union of States itself to arrange for the performance of treaties concluded by or binding upon its component parts. Since he had retained in the definition of 'union of States' the element of the separate identity of the union of the component States, it might be necessary to prepare a separate article to deal with the case where two or more States merged to form a unitary State.<sup>4</sup>

The difficulty of Waldock's position at this stage is made clear in his defence of the distinction between dissolution of a union and separation of a constituent State:

The essential reason for adopting a different rule for the cases covered by article 20 [dissolution of unions] was that the constituent political divisions of a union of States were, or had been, international persons that had their own treaties in the past . . . [T]he rule in the matter appeared to derive not from localization, but from the separate international identity of the constituent political divisions. Questions of internal constitutional identity were irrelevant so far as international law was concerned, unless accompanied by recognition of some measure of international identity.<sup>5</sup>

This looked very much like a return to notions of continuity of personality, and treaty rules, earlier rejected by the majority: on any other view his category of constitutional unions did precisely emphasize 'questions of internal constitutional identity'. Waldock's perplexity was clearly expressed in his summary of the debate:

Until comparatively recently the concept of a union of States had been reasonably clear, the key element being the question of separate international

<sup>1</sup> Draft Art. 21: *ibid.*, pp. 39-44.

<sup>2</sup> For the debate see *ibid.*, 1972, vol. 1, pp. 158-81. On the problem of the category 'union of States', cf. Ago, *ibid.*, p. 160; Ushakov, *ibid.*, p. 164; Reuter, *ibid.*, p. 165.

<sup>3</sup> e.g. Ushakov, *ibid.*, p. 175 ('In the case of Bangladesh . . . was it a separation, a division, or a dissolution?').

<sup>4</sup> *Ibid.*, p. 170.

<sup>5</sup> *Ibid.*, p. 232.

personality, but it had been somewhat obscured by recent events such as the formation of the United Arab Republic. Although that had appeared to be a clear case of a union of two quite separate entities, the constitution of the United Arab Republic had in fact been as much like that of a unitary State as it could be. The Constitution had specified that the Union legislature in Cairo should be the legislature of the whole territory of the Union and had not provided for any separate legislature in Syria at all. Because of the existence of such a precedent and the application of the principle of *ipso jure* continuity on the grounds that Egypt and Syria were two separate entities, what had once been a clear line of division had become blurred. Once the dividing line was no longer the actual retention of separate international personality, the difficulty of defining a union of States was considerable.<sup>1</sup>

It is clear that O'Connell was content to rest treaty continuity on constitutional continuity in cases of unions and federations. The Commission, on the other hand, was uneasy with this practical identification of international and constitutional legal issues. As a result, the category 'union of States' was abandoned in the Drafting Committee, and the continuity rule was extended to *all* cases of the 'uniting of two or more States in one State', and of the dissolution of States into several independent States (irrespective of the internal constitutional identity of the united or dissolved State).<sup>2</sup>

In its new form, the distinction between the separation of a new State and the dissolution of a State into one or more new States thus came to depend entirely on the continued existence of the predecessor State. To take Bangladesh as an example, if its creation involved the dissolution of the former State of Pakistan and the creation of two new States, then a regime of general treaty continuity would apply. If, on the other hand, Bangladesh was to be regarded as having separated from Pakistan, while the identity of 'Pakistan' was continued in the territory and government of West Pakistan, then Bangladesh began its life with a clean slate. There were a number of difficulties and dilemmas for Bangladesh in this situation. First, whatever claim it decided to make in the context of treaty succession could have unfavourable implications for its position in non-treaty matters, where the same categories might well govern.<sup>3</sup> Secondly, Bangladesh's position in relation to bilateral treaties was almost entirely inflexible: depending on which category was asserted (and subject to the *rebus sic stantibus* rule) either it succeeded to all or none. Thirdly, Bangladesh was by no means in control of the categorical decision which would be decisive, under the Draft Articles, since the category depended on the assertion by (West) Pakistan of a claim to continuity, and the recognition by other States of that claim. So far as Bangladesh was concerned, this process was very much *res inter alios acta*.

<sup>1</sup> *I.L.C. Ybk.*, 1972, vol. 1, p. 235.

<sup>2</sup> *Ibid.*, pp. 271-2 (subject to the usual *rebus sic stantibus* formula). Waldock's position on the new draft articles was reserved: *ibid.*, pp. 272, 273.

<sup>3</sup> Indeed, this was the case, as O'Connell was to point out: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 39 (1979), pp. 727-9.



These difficulties might perhaps have been tolerable if the categories of State continuity and State extinction were relatively clear and objective ones. But, while continuity of statehood is not in principle a wholly subjective concept,<sup>1</sup> in marginal cases it depends very much on subjective considerations, on claim and recognition. The ostensible distinction between secession and dissolution, in cases such as that of Bangladesh, is very much an illusory or arbitrary one.<sup>2</sup> None the less, in his first Report the new Special Rapporteur, Vallat, sought to maintain the distinction:

In the view of the Special Rapporteur, there is a clear theoretical distinction between dissolution and separation of part of a State . . . In the former case, the predecessor State disappears; in the latter case, the predecessor State continues to exist after the separation. This theoretical distinction may well have implications in the field of succession in respect of treaties . . . The fact that, in particular cases, it may be difficult to determine whether there has been a dissolution or a separation does not affect the theoretical distinction . . .<sup>3</sup>

He also affirmed the difference in the consequences to be derived from the distinction, though less affirmatively: the predominant consideration was 'the desirability of maintaining the continuity and stability of treaty relationships where possible'.<sup>4</sup>

But in the debate the distinction came under close and critical scrutiny. Several members suggested that since the distinction was arbitrary or unreal, similar consequences ought to flow from each category, and the general tendency was to favour treaty continuity rather than treaty termination.<sup>5</sup> In the event, the two draft articles were again fundamentally revised in the Drafting Committee. The effect of the revision was to subject both cases of new States formed from the dissolution of States *and* cases of separation or secession to a general regime of continuity. Only one exception was made, in a paragraph as unusual as it was unheralded:

Notwithstanding paragraph 1, if a part of the territory of a State separates from it and becomes a State *in circumstances which are essentially of the same character as those existing in the case of the formation of a newly independent State*, the successor State shall be regarded for the purposes of the present articles in all respects as a newly independent State.<sup>6</sup>

In reality the Commission, having rejected arguments based on 'localization', was attempting to distinguish what Tammes, following O'Connell,

<sup>1</sup> For discussion and references see Crawford, *The Creation of States in International Law* (1979), pp. 400-15.

<sup>2</sup> As the United States pointed out in its comment on the draft article: *I.L.C. Ybk.*, 1974, vol. 2 (1), p. 69.

<sup>3</sup> *Ibid.*, p. 70.

<sup>4</sup> *Ibid.*, p. 71.

<sup>5</sup> Quentin-Baxter's comment is representative: *I.L.C. Ybk.*, 1974, vol. 1, p. 185. Cf. Tammes, *ibid.*, pp. 184-5; Ushakov, *ibid.*, p. 185; Kearney, *ibid.*

<sup>6</sup> *I.L.C. Ybk.*, 1974, vol. 1, p. 258 (Draft Art. 27 (3)) (emphasis added).

described as 'evolutionary secession' from 'revolutionary secession'.<sup>1</sup> But since those categories are not rigid or distinct, this had to be done in overtly subjective terms, giving seceding States what amounted to a choice of regimes. As Reuter pointed out, 'there was no legal criterion applicable to decolonization and . . . the Commission was not afraid of adopting articles containing purely protestative clauses'.<sup>2</sup> It seemed a fair comment.

The process of evolution towards a general regime of treaty continuity in non-colonial contexts was, remarkably, completed at the Second Session of the Vienna Conference. There the 'protestative' exception, draft Article 33 (3), was deleted, with the result that *ipso jure* continuity now applied to *all* cases of secession from, and dissolution of, 'metropolitan' States.<sup>3</sup> The distinction which becomes paramount is that between 'newly independent States', where the clean-slate doctrine applies, and all other cases of new States, which are subjected to a general rule of succession. The definition of 'newly independent State' in Article 2 is thus a central one:

'newly independent State' means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.<sup>4</sup>

The distinguishing element is that the new State was previously a 'dependent territory', but no definition is given of 'dependent territory', nor is it a term of art. Some hint may be given in Article 15 of the Convention, which seems to suggest that a 'territory for the international relations of which a State is responsible' is not 'part of the territory of that State', but since there are in any view a number of situations<sup>5</sup> of which this is true, the suggestion is a faint one.<sup>6</sup> Clearly

<sup>1</sup> *I.L.C. Ybk.*, 1974, vol. 1, p. 259.

<sup>2</sup> *Ibid.*

<sup>3</sup> Treaty Succession Convention, Arts. 31-5. Draft Art. 33 (3) was deleted by 52 (U.S.S.R., U.S.A., Cyprus, Greece, Spain and many Afro-Asian States) to 9 (Australia, Finland, Japan, Papua New Guinea, Singapore, Surinam, Trinidad and Tobago, Venezuela, Yugoslavia) with 22 abstentions (including Brazil, India, Israel, New Zealand, U.K.). The majority rejected the possibility of analogies from the case of 'newly-independent States'; para. (3) required a political characterization unmanageable in a legal instrument. There was also some suggestion that it might encourage parts of a State to secede.

<sup>4</sup> Art. 2 (1) (b). The original definition of 'newly-independent State' emerged in 1972: *I.L.C. Ybk.*, 1972, vol. 1, p. 183 (where it is described, remarkably, as 'less equivocal'); cf. p. 270. There was still some uncertainty about the definition at the end of the 1974 session: *ibid.*, 1974, vol. 1, p. 263.

<sup>5</sup> e.g. some 'colonial' protectorates.

<sup>6</sup> In his First Report, Vallat suggested that a definition of 'dependent territory' was required, and proposed that '... "dependent territory" means any territory which immediately before the date of the succession of States was not part of the territory of the predecessor State' (*I.L.C. Ybk.*, 1974, vol. 2 (1), p. 31). This definition was either a reference to the domestic legal status of the territory, which (as the former Portuguese territories showed) is not a satisfactory criterion, or it assumed that dependent territories such as colonies are in some way removed from the sovereignty of the metropolitan State, an assumption which is, to put it mildly, controversial: cf. Crawford, *op. cit.* above (p. 39 n. 1), pp. 363-4. Perhaps for these reasons, the proposed definition was not discussed by the Commission. But see *I.L.C. Ybk.*, 1972, vol. 1, p. 270, where the term 'dependent territory' is said

enough the intention was to cover situations of colonial type, but since these tend to defy definition (apart from regimes such as that provided by Chapter XI of the Charter and its associated rules), the notion of 'dependent territory' has much in common with the rejected 'protestative clause', draft Article 33 (3). In particular, there is no reason why a territory cannot be at the same time both 'dependent' and 'metropolitan': Bangladesh, again, may well provide an example.<sup>1</sup> Such imprecision at the centre of a 'codifying' convention is remarkable.

O'Connell wrote comparatively little on State succession in the last ten years of his life,<sup>2</sup> but he did produce two stringent critiques of the Commission's work, the first largely devoted to the 1972 Draft Articles,<sup>3</sup> the second ostensibly to the Treaty Succession Convention but more accurately a comment on the Final Draft Articles.<sup>4</sup>

In all of his later work on the subject he laid great emphasis on the aspects of public administration rather than law involved. No doubt his own very considerable expertise in advising new States contributed to this view. Referring to the International Law Association Committee's work, he concluded:

Perhaps the Committee's most important insight, and certainly its most important influence, has not been in the field of legal doctrine but that of public administration. It quickly became evident that few governments, either of old or new States, had any very clear policies or ideas about succession, or had adopted any administrative measures to resolve the problem of disposing definitively of some 500 treaties. Upon independence their administrative structures became overloaded, their expertise was insufficient, their technical and even their library resources were inadequate, and they either brushed aside the problem by general policy statements which were not followed up by the necessary administrative activity, or they left it to the hazards of accident case by case.

Had the Committee been commissioned, say in 1957, and had it then grasped the significance of the problem of public administration which it later came to recognize, the total impact of its work might have been much greater. It was not until 1964 that it began to influence government practice, and it was not until the last stages of decolonisation that, on the basis of the experience gained, sufficient administrative machinery was devised to enable newly independent States to examine treaties in detail, and have cabinet resolve upon the fate of each of them, on the basis of departmental reports on treaty operation as well as legal advice. The result is that the situation is still very unclear and untidy in the cases of the

to cover 'colonial territories, trust territories and mandated territories'. The term is similarly defined in the draft articles on State Succession with respect to Matters other than Treaties, Art. 3 (f): above, p. 40, n. 2.

<sup>1</sup> Crawford, *op. cit.* above (p. 39 n. 1), pp. 116-17, 359-60.

<sup>2</sup> His Hague lectures in 1970 on 'Recent Problems of State Succession in relation to New States' were a fairly relaxed and discursive account of the problems: *Receuil des cours*, 130 (1970-II), pp. 93-206.

<sup>3</sup> 'The Present State of the Law on State Succession', in M. Bos (ed.), *The Present State of International Law and other Essays* (I.L.A. centenary essays, 1973), pp. 331-8.

<sup>4</sup> 'Reflections on the State Succession Convention', *Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht*, 39 (1979), pp. 725-39.



countries which became independent early compared with the situation of those which have gained their independence more recently.<sup>1</sup>

But at the level of doctrine, of legal rule rather than administrative practice, he was almost unreservedly critical of the Commission's work.<sup>2</sup> The Convention draws a sharp distinction between succession after decolonization and succession of a metropolitan territory, and O'Connell's criticisms were aimed primarily at the consequences of this distinction, which contrasted with his own flexible but general presumption. On the one hand he rejected the application of the clean-slate theory to cases of decolonization.

One fact overlooked by the Commission is that it is, in most cases, the newly-independent States which have invoked pre-independence treaties to their advantage, so that the political hypothesis upon which much of the Commission's work is based, and much of what has been said at the Conference on State Succession, is simply not sustainable. The only cases of State succession that have come before courts around the world in recent years have been extradition cases. There have been about a dozen of them. In most of these cases the pre-independence extradition treaty has been invoked by a newly-independent State, while in the remaining cases, when it is that State from which extradition has been sought, it has agreed that the treaty is in force.

The way in which the ILC seeks to accommodate this practice, which so evidently runs counter to the clean-state doctrine, is to give newly-independent States the option to declare succession to multilateral conventions, and the option to agree expressly or tacitly with the other party to a bilateral treaty to keep it in force. So far as the case of multilateral conventions is concerned, this is undoubtedly a sensible rule which reflects actual practice, but doctrinally speaking it is very disturbing. For it undermines mutuality of consent by giving States a unilateral right to bind other States, and the eventual consequences of this contradiction of the basic rule of consent in treaty law are unforeseeable.

So far as the case of bilateral treaties is concerned, the rule as stated is redundant, for States can agree, even in the most informal fashion, to keep treaties in force. The problem is that until they agree no one will know what the situation is, and whether the agreement will have retrospective effect. And governments are not motivated, and do not have the resources, to make decisions leading to agreement. So the State Succession Convention, while aiming at clarifying a situation that has become very unclear, in fact provides for perpetuation of the uncertainty.<sup>3</sup>

<sup>1</sup> Loc. cit. above (p. 41 n. 3), pp. 332-3. See further loc. cit. above (p. 41 n. 2), pp. 170-86.

<sup>2</sup> He dissented from the I.L.A.'s rejection of 'dispositive treaties': see *Report of the Fifty-third Conference* (1968), pp. 605-6. In this respect he agreed with the Commission, though he remained uncertain about the juridical basis of such treaties. Cf. above, pp. 4, 22.

<sup>3</sup> Loc. cit. above (p. 41 n. 4), p. 733. Despite its early rejection by the Special Rapporteur, O'Connell's general presumption of treaty continuity retained a degree of support even in the context of newly independent States. See, e.g., *I.L.C. Ybk.*, 1970, vol. 1, p. 165 (Kearney); *ibid.*, 1972, vol. 1, pp. 28-9 (Quentin-Baxter), 70-1 (Rossides). His 'localizing' argument was also supported by Tsuruoka; *ibid.*, 1974, vol. 1, pp. 63, 93, 97-8. Ushakov proposed that an exception to the 'clean slate' theory should be made for 'multilateral treaties of a universal character', a proposal very similar to that made by Jenks in 1952. It was not considered in detail by the Commission and was rejected by the Vienna Conference. Cf. *ibid.*, pp. 244-6, 264-5.

On the other hand, he thought the rigidity of the Convention's rules of succession in cases of 'metropolitan' territories excessive and unrealistic. The exact contrast was between his own (never very fully articulated) version of the *rebus sic stantibus* rule upon a succession, and the Convention's apparently more rigorous formula.<sup>1</sup>

In my experience in advising successor States I have found that administrative decisions as to succession to treaties tend to be taken on the basis of how the treaty would work in the changed circumstances. If it would work smoothly governments are prepared to continue it in force. If it would work in a distorted fashion they are likely to take the opposite view. This is really a matter of treaty interpretation, but then, of course, so also is *rebus sic stantibus* in a sense. The difference between the ways in which treaties are disposed of following change of sovereignty and other changes of circumstances is a matter of degree. *Rebus sic stantibus* requires the change to be fundamental. That might dispose of some treaties after change of sovereignty, but not of many. Yet successor governments will probably want to get rid of more treaties than just a few.

If change of sovereignty is to be subject to a more relaxed rule than other changes of circumstances, that means that we may need a category of State succession after all . . .<sup>2</sup>

He admitted that in practice a presumption rather than a rule would leave the matter to 'the subjective judgement of the new State':<sup>3</sup>

My solution has been to proceed upon a presumption of treaty continuity, and to allow the presumption to be rebutted case by case depending on the circumstances. That may be no more intellectually plausible than having a universal rule about succession, but it may be more practical.<sup>4</sup>

This was combined with persuasive arguments about the arbitrary or formal nature of the distinction between secession, dismemberment and decolonization. The effect, he argued, was to create a legislative code which was unlikely to be acceptable,<sup>5</sup> and which was less apt to harmonize

<sup>1</sup> Sc. 'if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation'. The formula appears in Arts. 15, 17 (2), 18 (3), 19 (3), 27 (5), 30 (2) and (3), 31 (1) and (3), 32 (3) and (6), 33 (2) and (5), 34 (2), 35, 36 (3), 37 (2). Cf. Vienna Convention on the Law of Treaties (1969), Art. 62.

<sup>2</sup> Loc. cit. above (p. 41 n. 4), pp. 738-9.

<sup>3</sup> Loc. cit. above (p. 41 n. 3), p. 334.

<sup>4</sup> Loc. cit. above (p. 41 n. 4), p. 739. Whether the Commission's formula (above, n. 1) is really more rigid than this depends on whether one regards it as more akin to the treaty reservations rule or to *rebus sic stantibus*. Cf. Kearney, *American Journal of International Law*, 69 (1975), at pp. 597-8.

<sup>5</sup> A new State which had not been a 'dependent territory', to be bound by the Convention's general rule of succession, would have to ratify the Convention and make an appropriate declaration under Art. 7. Quite apart from any flexibility in the formula (see previous note), such a State has to make two distinct choices before being 'bound' by the Convention *qua* treaty with respect to its own succession. Other States also have a choice in making an Art. 7 declaration. It might well be simpler and more flexible to continue both bilateral and multilateral treaties by *ad hoc* agreements, declarations or tacit consent. *Quaere* whether two 'old' States are obliged to treat a new State as a party to treaties even though the new State has made no declaration under Art. 7 and does not treat itself as bound. Presumably not.



the legal need for treaty continuity and stability with the political requirement of review of a predecessor's treaty commitments.

It is curious that O'Connell should end by espousing a successor State's freedom to rid itself of treaties, and by criticizing the Commission's general rule of treaty succession in non-colonial cases. The process by which that rule was arrived at was strikingly similar to the evolution of his own thought, and was in a way a testimony to his influence. If so, it was testimony he would have preferred to do without: his strongest conviction here was of the undesirability of codification.

The question of State succession to treaties is . . . part and parcel of a complex of cognate questions about the viability of treaties, and I suspect that we are just at the beginning of a new course of development in treaty law that will eventually make the Convention of State Succession obsolescent. Which is the reason why I am unrepentantly doubtful about the merits of codification, which can only arrest the historical development of the law and encapsulate it within a particular time-frame and a particular ideological milieu.<sup>1</sup>

### (3) *State succession and matters other than treaties*

I have traced the evolution of the Treaty Succession Convention in some detail, because of the interesting comparison it affords with the development of O'Connell's ideas, and because of the ways in which his ideas may have influenced the Commission (whether in support or opposition). For a variety of reasons, a much briefer account of the Commission's work on matters other than treaties will do here. First of all, that work—though discussion of it began before discussion of treaty succession—is not yet complete.<sup>2</sup> Secondly, although the Special Rapporteur began by proposing a quite general coverage of the topic, the extreme complexity of the issues, and the lack of consensus on crucial elements such as the doctrine of acquired rights, led to the gradual abandonment of such an extensive project. The Commission's Draft

<sup>1</sup> Loc. cit. above (p. 41 n. 4), p. 739. See also Treviranus, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 34 (1979), pp. 259-300. For a more favourable view, Yasseen, *Annuaire français de droit international*, 1978, pp. 59-113.

<sup>2</sup> In 1979, the Commission completed its first reading of 26 Draft Articles, which have been circulated to Member States for comment. See *I.L.C. Report (31st session) (General Assembly Official Records, 34th Session, Supp. 10)*, pp. 7-227; S. M. Schwebel, *American Journal of International Law*, 73 (1979), pp. 709-10. For the Reports of the Special Rapporteur (Mohammed Bedjaoui) see: First Report, *I.L.C. Ybk.*, 1968, vol. 3, pp. 94-117; Second Report, *ibid.*, 1969, vol. 2, pp. 69-100 ('Economic and Financial Acquired Rights and State Succession'); Third Report, *ibid.*, 1970, vol. 2, pp. 131-69 ('Succession to Public Property'); Fourth Report, *ibid.*, 1971, vol. 2 (1), pp. 157-91 ('Succession to Public Property'); Fifth Report, *ibid.*, 1972, vol. 2, pp. 61-9 ('Public Property'); Sixth Report, *ibid.*, 1973, vol. 2, pp. 3-74 ('Public Property'); Seventh Report, *ibid.*, 1974, vol. 2, pp. 91-116 ('State Property'); Eighth Report, *ibid.*, 1976, vol. 2 (1), pp. 55-110 ('State Property'); Ninth Report, *ibid.*, 1977, vol. 2 (1), pp. 45-118 ('State Debts'); Tenth Report, *ibid.*, 1978, vol. 2 (1), pp. 229-43 ('State Debts'); Eleventh Report, *ibid.*, 1979, vol. 2 (1), pp. 77-86 ('Archives'). For discussion see the *I.L.C. Ybk.* debates for 1968, 1969, 1973 and 1975-9.

Articles in fact deal only with State property, State debts and archives; and until the very last it was not settled whether the articles on State debts would cover only debts owed to States and other international persons, as distinct from all State debts.<sup>1</sup> Thirdly, neither O'Connell's own work nor that of the International Law Association has been referred to or relied on to anything like the same extent as it was in the Commission's work on treaty succession.<sup>2</sup> No doubt there may have been reasons for this,<sup>3</sup> but such comparative neglect must be regarded as unfortunate. For issues of non-treaty succession raise in an acute way problems of the relations between international and municipal law, as O'Connell saw very clearly. The Commission was both reluctant to confront these problems, and for a long time, while the ambit of its articles on State debts remained unsettled, uncertain as to whether it would have to do so. As a result, matters such as the continuity of law, of legal rights and of property interests, upon change of sovereignty, remain assumptions, with the Draft Articles poised ambiguously between a self-executing code providing directly for the transfer and subrogation of rights and interests, and a set of directory provisions capable of manipulation by domestic legislation and requiring subsequent action by, or agreement between, the parties to be effective.

At several stages during its work, the Commission was polarized over major issues: the doctrine of acquired rights,<sup>4</sup> the extent to which newly independent States should be given special treatment,<sup>5</sup> the ambit of the articles on State debts.<sup>6</sup> There can be little doubt where O'Connell would have stood on these questions; but the eventual Draft Articles, despite their generality, support a degree of succession which would have surprised a reader of the early debates, and which is by no means always inconsistent with O'Connell's own views on many of the issues. Indeed, as with the Treaty Succession Convention, outside the category of 'newly independent States' the Draft Articles support a *greater* degree of succession, or of

<sup>1</sup> Cf. Schwebel, loc. cit. (previous note). Originally, the definition of 'State debts' included debts owed to private individuals, corporations and so on: *I.L.C. Ybk.*, 1977, vol. 2 (1), p. 58. But Ushakov quickly proposed its restriction to international financial obligations, a proposal which sharply divided the Commission: *ibid.*, 1977, vol. 1, pp. 10-11, 30, 35-54, 172-4. The term '[international]' inserted in Draft Art. 16 was deleted in 1979: see *I.L.C. Report*, 1979, p. 115.

<sup>2</sup> O'Connell's work was not cited in Bedjaoui's First Report (above, p. 44 n. 2), dealing with the general conspectus of issues, especially acquired rights. Later, citations did occur (e.g. *I.L.C. Ybk.*, 1969, vol. 2, p. 73), but rather infrequently: cf. *ibid.*, 1977, vol. 2 (1), pp. 59-60, 64-5, 84.

<sup>3</sup> Generally Bedjaoui's Reports rely on European, especially French, literature. Cf. O'Connell's caustic view, *Quadrant*, 15 (1971), pp. 37-41.

<sup>4</sup> In his First and Second Reports (above, p. 44 n. 2), Bedjaoui launched a frontal attack on the doctrine of 'acquired rights', leading to an acrimonious debate in 1969: e.g. Kearney, *I.L.C. Ybk.*, 1969, vol. 1, pp. 59-62; cf. Castrén, *ibid.*, pp. 62-4. This led directly to the narrowing of the topic to State property and debts (cf. Waldock, *ibid.*, pp. 73-4, 93), although the issue tended to resurface in later sessions: e.g. above, n. 1.

<sup>5</sup> *I.L.C. Ybk.*, 1976, vol. 1, pp. 185-216 (State Property and newly independent States); *ibid.*, 1977, vol. 1, pp. 146-65 especially pp. 156-8, 182-8 (State Debts and newly independent States).

<sup>6</sup> Above, n. 1.

liability, than O'Connell generally did.<sup>1</sup> More particularly, the frequent references to 'equitable' apportionment of property or debts demonstrate how a notion very similar to unjust enrichment came to play a mediating role in the development of the Draft Articles.<sup>2</sup> O'Connell's own views, it has been argued, are better regarded as founded upon unjust enrichment than upon 'acquired rights' in the strict sense.<sup>3</sup>

O'Connell's criticisms of the codification of treaty succession would seem to apply *a fortiori* to the codification of succession to State property or debts. But there is a sense in which provisions which are both general and flexible in terms, and obviously not codifications of existing law, may escape such criticisms. Members of the Commission acknowledged, clearly and often, that their role here was more legislative than codificatory,<sup>4</sup> and the drafting of general legislation on these topics must presumably be of at least some value. What it is likely to do, if the Draft Articles are embodied in a treaty, is to provide a framework within which State practice may continue to develop and in which the 'equitable circumstances' governing apportionment may become more precise.<sup>5</sup> At least, it seems a plausible argument. And the, now rather blurred, ideological assumptions of the Draft Articles are by no means as radically uncomfortable as O'Connell, writing in 1973, had feared.<sup>6</sup>

#### (4) Conclusion

There can be no doubt that O'Connell was the leading authority in the field of State succession, and his influence, in the literature and on the work of the International Law Commission, was commensurate with this. In relation both to treaties and to State property and debts, the

<sup>1</sup> The draft articles provide for a rather more extensive succession to State property than O'Connell seems to have thought was the case: cf. Arts. 10-14 with *State Succession* (1967), vol. 1, ch. 9. In particular, O'Connell thought that no transfer was required of extraterritorial property in cases other than universal succession: *ibid.*, pp. 207-10. For criticism see Bedjaoui, *I.L.C. Ybk.*, 1973, vol. 2, pp. 43-5. O'Connell thought that a rule requiring repartition of State debts on a partial succession was 'in the process of crystallization': *op. cit.*, p. 396. Arts. 19 and 22 propose such a repartition based on an 'equitable proportion'. But the rule for newly independent States (Art. 20) is much more restrictive and represents an obvious compromise between conflicting positions. Cf. *I.L.C. Report*, 1979, pp. 174-8.

<sup>2</sup> Notions of proportional or equitable contribution are used in Arts. 11 (1) (c), 13 (1) (c), (3), 14 (1) (b), (d), 19 (2), 22 (1), 23, B (2). Bedjaoui had criticized 'unjust enrichment' in his Second Report: *I.L.C. Ybk.*, 1969, vol. 2, pp. 95-6, but in the ensuing debate its advantages as a mediating concept became clear: *ibid.*, 1969, vol. 1, p. 69 (Reuter), p. 74 (Waldock). Considerations very similar to it were expressed by Bedjaoui in the context of State claims: cf. *ibid.*, 1973, vol. 2, p. 19.

<sup>3</sup> That is, in the case where the original legal interest or obligation lapses by operation of law (e.g. frustration) on the change of sovereignty: above, p. 30.

<sup>4</sup> See especially Ago, *ibid.*, 1973, vol. 1, pp. 101-2. Also Vallat, *ibid.*, 1975, vol. 1, p. 79; El-Erian, *ibid.*, 1977, vol. 1, p. 155. Nagendra Singh had earlier proposed that the Commission try to avoid both 'slavish codification and unrestrained development': *ibid.*, 1968, vol. 1, p. 104.

<sup>5</sup> This may be happening to the 'equitable apportionment' rule for the continental shelf, as outlined in the *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, p. 6. The influence of this analogy in the Commission's work on non-treaty succession was clear and acknowledged: e.g. Tammes, *I.L.C. Ybk.*, 1976, vol. 1, p. 168.

<sup>6</sup> *Loc. cit.* above (p. 41 n. 3), pp. 337-8.



Commission's early positions were quite different from O'Connell's, to the extent that he became in a sense an unofficial, notional opposition. But in its study of treaty succession, the Commission's position (outside the colonial context) changed drastically, coming not merely closer to O'Connell's presumption of continuity but, on one view, going even further, so that at the end of the day O'Connell's presumption was more flexible, more favourable to new States, than the Commission's rules. (Flexibility, in the State Succession Convention, is achieved in the machinery for applying its rules, and in the obscurity of the term 'dependent territory'.)

The position of the general law, after these developments, must be rather uncertain. One difficulty with State succession is that, for the primary actor, the event is always a novel one. Other States, facing succession problems more frequently and in a variety of contexts, have shown themselves not to be particularly interested in the application of a regime of rules. Consistency of practice has thus, inherently, tended to be lacking. In the end, it may be that the problems are dealt with by the application (or manipulation) of diverse rules and techniques; continuity of, or reversion to, legal personality, novation, acquiescence, self-determination and the law of territorial regimes. The result may still be, as O'Connell contended, a presumption in favour of treaty continuity, but if so it may be that it is achieved not by any single rule but in a variety of ways.

The partial convergence of the Commission's and O'Connell's views on succession to State property and debts is more surprising than the more complete convergence in treaty succession: the problems are more ideological, less technical or administrative, and the initial positions were very far apart. The same dichotomy of ex-colonial and other territories exists in the Commission's Draft Articles as in the Treaty Succession Convention: O'Connell, of course, rejected this altogether, proposing a general, though flexible, regime. But in non-colonial situations, convergence occurred through the adoption of the imprecise standard of equitable apportionment, which plays the same role in the Draft Articles as, it has been argued, unjust enrichment did in O'Connell's doctrine. If there is to be law here, it will come in the elaboration of these very general standards, in a process of particularization through practice. On the other hand, if such elaboration does not occur, the problems will remain, as O'Connell feared, an opportunity for diplomacy, an invitation to dispute.

### 3. PROBLEMS OF THE TERRITORIAL SEA IN FEDERAL STATES

A second subject which occupied O'Connell's attentions from time to time through much of his working life was the status of the maritime zones



in federal States, in particular, the problem of attributing rights and powers with respect to the territorial sea to the central or local polities within federations. So far as Australia and other Commonwealth federations are concerned, he effectively initiated the debate, setting its terms in an influential early article. Later he revised his early, tentative, views in the light of more detailed research and investigation; and the divergences in the literature and case-law in Commonwealth jurisdictions reflect, and to an extent can be attributed to, the divergence of his earlier and later views.

The subject is not precisely one of general international law, but a problem of the reaction of municipal constitutional law to the international law of the territorial sea. It is ridden with the technicalities of English curial history, but is of more general interest in its reflection of changing views of the international legal status of the territorial sea, and its exposure of some of the problems of the relations between international law and common law systems.

### 3.1. *R. v. KEYN* AND THE TERRITORIAL SEA IN FEDERATIONS: O'CONNELL'S EARLY VIEW

Apparently, O'Connell's attention was drawn to the problem soon after his arrival in Adelaide in the early 1950s. His first essay at unravelling the complex issues was an article published in 1958 in this *Year Book*.<sup>1</sup> A number of distinct questions were dealt with there: for example, the meaning of the term 'territorial limits' in the federal fisheries power, and the consequent ambit of that power;<sup>2</sup> the problems of Australian bays, and the status of the waters surrounding the Great Barrier Reef. For present purposes it is enough to discuss the central question whether State boundaries (as established in 1900 or at some other time) include the three-mile territorial seas. The presumed consequences of such inclusion would be that the Crown in right of the States owns the sea bed, and that the ordinary distribution of legislative powers in the Constitution would apply. On the other hand, if the territorial sea is external to the States, then it is less likely that the sea bed constitutes State Crown lands, and the Commonwealth legislative power would be more extensive, if not plenary (and State legislative power correspondingly less).<sup>3</sup>

Of course these problems were, in 1958, by no means novel. The United

<sup>1</sup> 'Problems of Australian Coastal Jurisdiction', this *Year Book*, 34 (1958), pp. 199-259. See also, at about this time, his 'Sedentary Fisheries and the Australian Continental Shelf', *American Journal of International Law*, 49 (1955), pp. 185-204; 'The Geneva Conference on the Law of the Sea: Possible Implications for Australia', *Australian Law Journal*, 32 (1958), pp. 134-7.

<sup>2</sup> Constitution of the Commonwealth of Australia, 1900, s. 51 (x) ('fisheries in Australian waters beyond territorial limits').

<sup>3</sup> An intermediate possibility, not canvassed in the literature, was that while State boundaries, as defined in the constituent documents, ended at low-water mark on the open coast, the States none the less owned the sea bed as Crown waste, by virtue of the combination of the relevant rules of English law as to Crown ownership of the sea bed and the exercise of colonial control over it. See below, p. 58 n. 2.

States Supreme Court had already decided that the territorial sea was external to the States and a matter of paramount federal concern and competence,<sup>1</sup> although it had done so on grounds that could easily be distinguished by a Commonwealth court, and with no examination of the case-law and practice in Commonwealth countries.<sup>2</sup> The matter had already been canvassed in one Australian case (where opinions were divided).<sup>3</sup> It was known that the English position, uncomplicated by federal difficulties, was still obscure.<sup>4</sup> None the less, the general assumption, in Australia at least, was that the States did include the three-mile territorial sea. Such an assumption had some justification, as it seems to have been shared by the drafters of the federal Constitution,<sup>5</sup> and it was certainly supported by much nineteenth-century practice and opinion.<sup>6</sup> In 1958, for the first time, O'Connell set out the contrary arguments in full. Although his own view of them was expressed in very tentative and cautious terms, his arguments shook these assumptions and started a debate which was to last for over twenty years.

Central to the analysis was the disputatious and unwieldy case of *R. v. Keyn*,<sup>7</sup> decided by a majority of one among thirteen judges in the Court for Crown Cases Reserved. The exact question there was whether a foreign captain of a foreign ship, whose negligence caused the death of an English woman aboard a British ship within three miles of the English coast, could be tried in the Central Criminal Court. Although, as O'Connell said, the case had been thought to be 'limited to a determination of the jurisdiction of the Lord High Admiral and to have avoided any decision on the extent of the territory of England',<sup>8</sup> the view he presented was very different.

A close study of the case will disclose that its scope cannot be narrowed down in this fashion. The Court of Oyer and Terminer historically took cognizance of offences committed in the body of a county, the Court of the Lord High Admiral those on the sea. Each court claimed concurrent jurisdiction over inland waters. By statute the Admiral's jurisdiction came to be exercised by the Central Criminal Court. It was not disputed that had the defendant in *R. v. Keyn* been a British

<sup>1</sup> *U.S. v. California*, 332 U.S. 19 (1947); *U.S. v. Louisiana*, 339 U.S. 699 (1950); *U.S. v. Texas*, 339 U.S. 707 (1950). Congress thereupon 'restored' State rights in the league seas: the Submerged Lands Act 1953 was held valid in *Alabama v. Texas*, 347 U.S. 272 (1954). Subsequent cases have involved the extent of State dominium beyond three miles: *U.S. v. Louisiana*, 363 U.S. 1 (1960); *U.S. v. Florida*, 363 U.S. 121 (1960); *U.S. v. Louisiana*, 420 U.S. 529 (1975); *U.S. v. Florida*, *ibid.*, 531 (1975). The early cases were upheld, on principle and as a matter of precedent, in *U.S. v. Maine*, 420 U.S. 515 (1975).

<sup>2</sup> The critical date, in the U.S. cases, was the late eighteenth century. Thereafter the matter was determined by the 'equal footing' doctrine. *R. v. Keyn*, (1876) 2 Ex. D. 63, was cited only once (332 U.S. at p. 33), to establish that even then there was 'considerable doubt in England about [the] scope and even [the] existence' of the territorial sea. No other British practice or case-law was cited.

<sup>3</sup> *D. v. Commissioner of Taxes*, [1941] St.R.Q. 218.

<sup>4</sup> Cf. *A.G. for British Columbia v. A.G. for Canada*, [1914] A.C. 153 at p. 174.

<sup>5</sup> As O'Connell pointed out: 'Problems of Australian Coastal Jurisdiction', this *Year Book*, 34 (1958), pp. 225-6.

<sup>6</sup> *Ibid.*, pp. 224-5. See further, Marston, *Australian Law Journal*, 50 (1976), pp. 402-9.

<sup>7</sup> (1876) 2 Ex.D. 63. See Marston, *Law Quarterly Review*, 92 (1976), pp. 93-107.

<sup>8</sup> *Loc. cit.* above (p. 48 n. 1), p. 206.

national the Court would have had jurisdiction. It would also have had jurisdiction if the offence had been committed within the body of a county. The question whether territorial waters were within the body of a county was thus placed directly in issue, and the discussion of the jurisdiction of the Lord High Admiral followed only upon a determination that they were outside the realm. Of the minority Judges only four decided that the waters in question were subject to the Crown *dominium* . . . The difficulty with this argument lay precisely in the validity of the assumption. Although most international lawyers had accepted that territorial waters were part of the national territory and included within the national boundary, the matter was not altogether beyond controversy in 1876. And even if international law admitted *imperium* and/or *dominium* as well as jurisdiction in territorial waters, it was questionable whether the above-mentioned legislation constituted an extension of the Crown's domain, or anything more than the exercise of a limited regulatory control. The judicial decisions invoked by the minority were of no great weight since they were not arrived at by any sort of historical or analytical examination . . .

The most cogent opinions in the case are those of two of the majority Judges, Sir Robert Phillimore and Cockburn C.J., who came to the conclusion that jurisdiction over territorial waters is different from that over 'ports' and over land because its purpose is different. In the one case there is a *jus transitum*, in the other there is not. Jurisdiction over territorial waters is derived from the necessities of defence and security and does not, therefore, of its nature imply a right of property . . .

*R. v. Keyn* thus clearly decided, though by a narrow majority, that the territory of England ends at the low-water mark and that the jurisdiction of the Admiral which begins at that point did not, historically, embrace foreign nationals. To avoid the embarrassment of not being able to exercise police control over foreigners in British territorial waters, Parliament intervened and in 1878 enacted the Territorial Waters Jurisdiction Act. Keith comments that the Act rendered *R. v. Keyn* innocuous, but this is by no means the case. It merely covered the gap in the Admiral's jurisdiction; it did not enlarge or purport to declare the law as to the juridical character of British territorial waters.<sup>1</sup>

This apparently firm and definite approval of a 'territorial' interpretation of *Keyn's* case was considerably qualified in later discussion. As a result of the British position taken at the Geneva Conference in 1958, and its adherence to the proposition (by then well settled) that the territorial sea was a zone of sovereignty, 'the conclusion might well be drawn that the national boundary now extends to embrace the territorial belt'.<sup>2</sup> Moreover the majority in *Keyn* 'neglected some of the most important evidence favouring sovereignty over territorial waters'.<sup>3</sup> But this seemed to be a qualification rather than a disavowal; his conclusion on the point, though hedged, was an affirmative one:

unless *R. v. Keyn* was manifestly wrong, it decided at least for the nineteenth

<sup>1</sup> Loc. cit. above (p. 48 n. 1), pp. 206-9.

<sup>2</sup> Ibid., p. 216.

<sup>3</sup> Ibid.



century, which is the significant period in the inquiry . . . , that the seaward boundary of all British territory is the low-water mark.<sup>1</sup>

The case-law and practice in Commonwealth federations was then examined, but that practice was based on unwarranted assumptions:

There is, in fact, a whole stream of opinions and decisions on the subject of colonial extra-territorial legislative incompetence which assume that there is jurisdiction over territorial waters because these are 'intra-territorial'. The identification of jurisdiction with sovereignty was, however, a misconception. Colonial legislatures had competence over territorial waters because they were exercising over them the protective jurisdiction necessary for the 'peace, order and good government' of the colonies, not because the waters were within their boundaries . . . A purely analytical construction of the relevant Statutes would . . . appear to fix the maritime boundaries of at least some of the Australian colonies at the high—or low—water mark.<sup>2</sup>

He concluded with this prescient comment:

It would seem . . . that the State boundaries, though fixed at a *minimum* in 1900, are susceptible of automatic expansion to a *maximum* merely at the instance of the Commonwealth Executive, and this must be as true of territorial waters, supposing they are within the State boundaries, as of inland. A State might thus suddenly find itself exercising legislative jurisdiction over an area it never supposed to be within its competence. By the same token, the Commonwealth Parliament might find itself excluded from the area for some specific legislative purposes. The alternative, so far as territorial waters are concerned, is to conclude that they are not State territory at all, and the very flux in the law and the consequent flexibility of the boundary between territorial waters, internal waters, contiguous zones and high seas, offer a good policy argument for so doing. *R. v. Keyn* could thus be a useful peg on which to hang a policy decision not very different from that in the tidelands cases . . . At bottom the problem is one of collision between two incompatible doctrines, the sovereignty of the constituent elements in a federal system, and their lack of responsibility in international relations. The way a court will approach the problem of maritime boundary will in the last resort depend upon its attitude to federalism as a theory and system of government.<sup>3</sup>

'Problems of Australian Coastal Jurisdiction' was primarily a survey of difficult issues, rather than a clear exposition of a particular solution. None the less the apparently firm 'territorial' view of *R. v. Keyn*, and the account of its implications for federal States such as Australia and Canada, were much debated. Several refutations of O'Connell's view appeared,<sup>4</sup> and it was itself repeated, in more or less the same terms, in the collection of essays he edited, *International Law in Australia*,<sup>5</sup> and, very briefly, in

<sup>1</sup> *Ibid.*, p. 217, and cf. n. 2, distinguishing Scots law from the common law.

<sup>2</sup> *Ibid.*, pp. 224–7. On related issues see his 'The Doctrine of Colonial Extra-territorial Legislative Incompetence', *Law Quarterly Review*, 76 (1959), pp. 318–23.

<sup>3</sup> *Loc. cit.* above (p. 48 n. 1), pp. 257–8, 259.

<sup>4</sup> E. Campbell, *Tasmanian University Law Review*, 1 (1960), pp. 405–28; R. D. Lumb, *The Law of the Sea and Australian Offshore Areas* (1966), pp. 55–62, and cf. 'Sovereignty and Jurisdiction over Australian Coastal Waters', *Australian Law Journal*, 43 (1969), pp. 421–40, 449.

<sup>5</sup> 'Australian Coastal Jurisdiction', in O'Connell (ed.), *International Law in Australia* (1965), pp. 246–91.



*International Law* (1965).<sup>1</sup> More importantly, the Canadian Supreme Court, in 1967, apparently approved and adopted O'Connell's view in its full extent.<sup>2</sup> Certainly this was the opinion held by commentators<sup>3</sup> and, it seems, by O'Connell himself. His comment on the Court's reasoning served only to reinforce its decision:

The relevance of the decision to the Australian situation cannot be ignored: unless the Supreme Court was wrong, its analysis is as valid for that situation as for the Canadian situation. But there is a factor not to be overlooked, and which the Canadian Supreme Court, because of its disappointingly legalistic approach, dealt with cursorily: this is the factor of international responsibility in the marginal sea of federal States. Is it satisfactory to have jurisdiction over maritime activities partitioned between a central government, which will be internationally responsible for breaches of international law, and regional governments which may be beyond the constitutional control of the central government?<sup>4</sup>

In Australia, too, his view was taken up by influential commentators,<sup>5</sup> and, even more significantly, by Windeyer J. and (to a lesser extent and inferentially) Barwick C.J. in *Bonser v. La Macchia*<sup>6</sup> (though the point did not actually arise there).

### 3.2 RESTRICTING *R. v. KEYN*: O'CONNELL'S LATER VIEW

However tentatively expressed it may have been, O'Connell's view acquired substantial authority from its judicial adoption in Canada and Australia. But paradoxically, the reasoning on the point in *Bonser v. La Macchia* (together with the notion of the *ab initio* appurtenance of the continental shelf expounded by the International Court in the *North Sea Continental Shelf* cases<sup>7</sup>) seem to have roused in him concern and disquiet. In the Australian case, their source was the 'hitherto unapprehended

<sup>1</sup> *International Law* (1965), vol. 1, pp. 536-9. The second edition is little different: (1970), vol. 1, pp. 470-3.

<sup>2</sup> *Reference re Ownership of Off-shore Mineral Rights*, (1967) 65 D.L.R. (2d) 353. The Supreme Court cited O'Connell's *International Law* on the juridical status and extent of the territorial sea: *ibid.*, p. 367, but on the crucial municipal law problem cited *Coulson and Forbes on the Law of Waters* . . . (6th edn., 1952), p. 12. For earlier discussion of the Canadian situation, see *Re Dominion Coal Co. Ltd. and County of Cape Breton*, (1963) 40 D.L.R. (2d) 593 (Nova Scotia S.Ct.), especially *per* MacDonald J. at pp. 630, 632 (citing O'Connell's 1958 article).

<sup>3</sup> e.g. N. Kaplan, *McGill Law Journal*, 14 (1968), pp. 475-93 at p. 476 n. 25; C. Warbrick, *International and Comparative Law Quarterly*, 17 (1968), pp. 501-13 at p. 504.

<sup>4</sup> 'Problems of Australian Coastal Jurisdiction', *Australian Law Journal*, 42 (1968), pp. 39-51 at p. 41. See also the evidence O'Connell gave to a Senate Committee in 1969: *Report from the Senate Select Committee on Off-Shore Petroleum Resources*, vol. 2, *Minutes of Evidence*, pp. 670-702 (Cth., Parliamentary Paper No. 201A). The Committee's *Report* (Parliamentary Paper No. 201 (1971), pp. 136-43) points out the disagreement between O'Connell and other commentators.

<sup>5</sup> e.g. V. Windeyer, 'The Seabed in Law', *Federal Law Review*, 6 (1974), pp. 1-25 at pp. 18-21; and cf. Note, *Australian Law Journal*, 44 (1970), pp. 189-90.

<sup>6</sup> (1969) 122 C.L.R. 177 *per* Barwick C.J. at pp. 184-9; *per* Windeyer J. at pp. 213-31 (acknowledging (p. 215) his indebtedness to the 1958 article). Kitto J. indicated tentative disagreement with this view (at pp. 201-2). Menzies J. expressly refused to decide the point (at p. 209).

<sup>7</sup> *I.C.J. Reports*, 1969, p. 6 at p. 31. The Court's decision was given after the completion of argument, but before judgment, in *Bonser v. La Macchia*, and was cited by Barwick C.J. in support of his view: (1969) 122 C.L.R. 177 at p. 186.

possibility', elaborated in particular by Barwick C.J., that the territorial seas had been acquired before 1900, but only by the Imperial Crown, so that they remained external to the Australian colonies. Two difficulties were presented: how and when, between 1876 and 1900, did this acquisition occur, and how could it be squared with orthodox views of the devolution of responsible government within the Empire?

The implications of the notion that the Crown, in right of the United Kingdom, 'owned' the territorial sea of its colonies to the exclusion of their legislatures are startling . . . , and the clear, legalistic approach of the Canadian Supreme Court, untrammelled by historical hypotheses, is a refreshing contrast. That Court did not need to consider the position of the Imperial Crown because of the date of Canadian federation. It did not matter when Canada acquired dominion in the territorial sea, or by what means, or even, for the purposes of that case, if it acquired it at all. When both Chief Justice Barwick and Justice Windeyer, then, adopt the Canadian Supreme Court judgment and its reasoning, they are in fact reading much more into that judgment than the Canadian Supreme Court intended.<sup>1</sup>

As to the International Court's decision, if the continental shelf belonged *ipso jure* and *ab initio* to the coastal State, then surely the territorial sea did so too?

It has not taken the High Court of Australia long to perceive the implications of the International Court's statement . . . By *ipso facto* seems to be implied that these rights exist even if the coastal state does not claim or exercise them, and indeed, this is what the International Court said. The expression *ab initio* suggests a relation back in time, perhaps in geological time, for what the Court appears to mean is that no history of events can be utilized to negate any coastal state's inherent rights to the seabed, even though, when the events occurred, the continental shelf doctrine was not imagined. On this argument, the rights in question existed in relation to the seabed of the Australian continental shelf in 1876, and it then becomes arguable that it was beyond the power of the Court in *Regina v. Keyn* to deprive the Crown of them. If they amount to sovereignty, then *Regina v. Keyn* might have been wrongly decided, and everything that follows from it would be fallacious.<sup>2</sup>

This was a new, critical, note; and he began to assert the need for much more thorough research into the issues.

. . . a word of caution should be sounded: the matter is very complex, [and] the solution appears to depend upon basic theoretical research which must be undertaken on an extensive scale . . .<sup>3</sup>

It now becomes clear that we are confronted with a murky legal history, much confused thinking and too much casual research into the antecedents of the problem. The judiciary which is now called upon to make findings of law has not grappled happily with the intertwined strands of precedent, history, political

<sup>1</sup> 'The Federal Problem Concerning the Maritime Domain in Commonwealth Countries', *Journal of Maritime Law and Commerce*, 1 (1970), pp. 389-418 at pp. 400-1.

<sup>2</sup> *Ibid.*, p. 407.

<sup>3</sup> Comment, *Australian Law Journal*, 43 (1969), pp. 441-4 at p. 442; and cf. Lord Wilberforce's remark (p. 448), that though research is required, we cannot afford 'the luxury of very long research'.

philosophy, local and international issues which make up the problem, and it cannot be expected to do so without better guidance through this labyrinth of source material than has hitherto been provided by legal investigation. There is a serious danger that the litigious issues will now crystallize quickly and that a premature decision may be given in which all the ramifications of the question are not fully examined. If bad history tends to make bad law, in a federal system where vast sociological issues are at stake too much frozen precedent may compound the evil.<sup>1</sup>

Nearly one hundred years later, we are again at a doctrinal watershed. We only vaguely apprehend that the doctrines of territory and sovereignty are undergoing a transformation in virtue of the changing functions of government, of social and international organization, and of industrial development. Just as in 1876 the 18th-century theory of the state was being replaced with the 19th-century theory, and legal notions which had their roots in a proprietorial view of state power were collapsing, so in 1970 we are confronted with a drastic reevaluation of the legal premises of national jurisdiction. It will be much easier in fifty years' time than it is today to assess the arguments which are now beginning to emerge in a diffused manner respecting maritime enterprise, but this merely means that we should be at least as conscious as Justice Phillimore was in *Regina v. Keyn* of the ramifications of the issues.<sup>2</sup>

It is true that in the three papers from which these comments come he adhered to his earlier view, partly at least on 'policy' grounds, but the matter evidently called for reconsideration and this he proceeded to give it.<sup>3</sup> The result was a major revision of the earlier opinion, a fundamental re-examination of the problem published as 'The Juridical Nature of the Territorial Sea' in this *Year Book*.<sup>4</sup>

This long article, one of the best he wrote, involved a coalition of his interests—the long-established concern about the common law status of the territorial sea, and his growing interest in the general law of the sea. It begins with a much more thorough account of the English assertions to dominion over the sea. These had previously been thought to have expired in the seventeenth century, by O'Connell no less than Cockburn C.J. But it would be surprising that a doctrine so confidently asserted by Hale should suddenly and mysteriously vanish, especially since some evidence at least of the continued assertion of Crown rights to the sea bed was available.

What happened during the period around 1700 was that the claims to *Mare Anglicum* were not persisted in politically—although they may have influenced the draftsmanship of the Hovering Acts in the eighteenth century—but that the common law tradition of the Crown's property in the sea descended into the caverns of lawyers' law, where it flowed as strongly as ever until it reappeared on

<sup>1</sup> 'The Australian Maritime Domain', *Australian Law Journal*, 44 (1970), pp. 192-208 at p. 194.

<sup>2</sup> Loc. cit. above (p. 53 n. 1), pp. 412-13.

<sup>3</sup> At about this time he was retained by some of the Australian States to advise on the conflict with the Commonwealth over maritime zones. He also produced, with A. Riordan, a collection of Law Officers' opinions mostly dealing with these issues: *Opinions on Imperial Constitutional Law* (1971). For a development of possible arguments relating to the continental shelf, see his 'Adumbrations of the Continental Shelf Doctrine', *La Communauté Internationale. Mélanges offerts à Charles Rousseau* (1974), pp. 173-85.

<sup>4</sup> This *Year Book*, 45 (1971), pp. 303-83.



the surface in the nineteenth century in connection with the three-mile limit. This being so, the only possible way of regarding the matter is to suppose that the territorial sea, whatever dimensions it may have at any time possessed, was consistently part of the royal waste.<sup>1</sup>

This view of things presented two difficulties. The first was the problem of delimitation of the Crown's rights to the sea bed, since though its extent was quite obscure, it is clear that the original 'claim' extended far beyond three miles. The second was the decision in *Keyn's* case. No clear answer has been given to the first problem, and O'Connell did not expressly deal with it.<sup>2</sup> But as to the second, a new and much more likely interpretation was adopted. The majority decision in *Keyn*

... resulted from the fortuitous coincidence of opinions which differed materially in their arguments and starting-points . . . Although there is an obvious connection between the questions of the extent of England and the extent of the jurisdiction of the courts, the question of the extension over the territorial sea of the jurisdiction of the common law courts—which had undisputed jurisdiction over aliens—was not logically foreclosed by a decision that the territorial sea was part of the territory of England. That jurisdiction was historically conditioned, and it was coincidental with the geographical extent of the sheriffs' jurisdiction in the Middle Ages, which was restricted to the body of a county. If the counties ended at the low-water mark, as the Court found they did, so did the common law jurisdiction, and this is irrespective of the question whether the territorial sea had later been added to the territory of the Kingdom, or was a residue of the medieval royal waste. The case called for no more than a decision on the jurisdiction of the courts, as historically determined, and this point was intrinsically unconnected with the question of the extent of the Crown's domain.<sup>3</sup>

There can be no doubt . . . that the word 'Realm' [in the statute 13 Ric. III, c. 5] . . . signified only the area of judicial jurisdiction and not the extent of the Crown's territory which, as in the case of Wales or the Channel Islands, extended beyond the counties of England. The question whether the Kingdom was wider in extent than the 'Realm' was a different one, which did not call for decision . . . [T]here appears to be only a minority of the Court which explicitly found that the territorial sea was extraterritorial, as distinct from being outside the bodies of the counties. It may be a little odd to suppose that the territory of England was broader than the Realm, but there is no reason why this should not be the result of historical processes whereby the 'Realm', as a statutory expression, remained spatially frozen, while the Crown's property rights expanded beyond the borders of the Realm . . . This point dominates the judgment of Cockburn C.J., who held that only Parliament could alter the distribution of judicial competence between Admiralty and common law, which it had itself laid down. His assumption that the Crown did not have property within the area of the Admiralty jurisdiction does not follow and is unnecessary to his judgment.<sup>4</sup>

<sup>1</sup> Ibid., p. 319.

<sup>2</sup> Perhaps the British espousal of the three-mile rule was a renunciation of more extensive claims (though this might raise the vexed question of the Crown's capacity to cede territory). Perhaps the international law limit was incorporated in some more direct way. Cf. *New South Wales v. Commonwealth*, (1975) 135 C.L.R. 337, *per* Stephen J. at pp. 432-3, 448.

<sup>3</sup> Loc. cit. above (p. 54 n. 4), pp. 328, 330-1.

<sup>4</sup> Ibid., pp. 373-4.



This new interpretation was accompanied by a very thorough analysis of the doctrine relating to the juridical status of the territorial sea in international law.<sup>1</sup> The point was to show that, if international law did not concede sovereignty over the territorial sea in 1876, it did not do so until, at least, 1919.<sup>2</sup> As Phillimore J. seems to have perceived, the issue, apparently settled early in the nineteenth century, had become unsettled again because of the implications for a 'property' theory of the now-established right of innocent passage; and it was this problem—what would now be described as the non-self-executing nature of a rule combining sovereignty and a *jus transitum*—that caused several of the judges in *Keyn* so much difficulty.<sup>3</sup>

The effect of this account was to refute Barwick C.J.'s theory of the acquisition by the Imperial Crown of the territorial sea *after* 1876:

it is clear that the period between 1876 and 1900 (the date of the federation of the Australian colonies) was the high point of doubt respecting the juridical nature of the territorial sea. Assuming that the Territorial Waters Jurisdiction Act did not in itself alter the legal status of the territorial sea the acquisition by the Crown, if it occurred at all, must then have occurred between 1900 and 1926. But the only event of any significance in this period respecting the territorial sea was the Paris Convention of 1919, and this the Dominions separately signed and separately legislated for, so that it is improbable that the United Kingdom acquired any status in the territorial seas of the Dominions additional to any they may have possessed themselves.<sup>4</sup>

Moreover, his notion that the Imperial Crown had special rights in the territorial sea as distinct from the land territory of the colonies was contrary to the facts:

... The Imperial Government in fact exercised no more legislative and executive control over the colonial territorial sea than was consistent with the ordinary constitutional relationships between the colonies and the United Kingdom.

<sup>1</sup> Ibid., pp. 324–56. For an account of the effect of *Keyn's* case on German doctrine of the territorial sea, see his 'German Literature on the Territorial Sea 18th and 19th Centuries', *Wengler Festschrift* (1973), vol. 1, pp. 325–35. See also Marston, this *Year Book*, 48 (1976–7), pp. 321–32, distinguishing the evolution of sovereignty over the sea bed from that over the territorial sea and air-space.

<sup>2</sup> Art. 1 of the Paris Convention relative to Air Navigation of 13 October 1919 (*League of Nations Treaty Series*, vol. 11, p. 173) established sovereignty over air-space above the territorial sea.

<sup>3</sup> Of the majority, two judges thought that the right of innocent passage precluded the territorial sea from being classified as a zone of sovereignty: Phillimore J., (1876) 2 Ex.D. 63 at pp. 81–2; Kelly C.B. at p. 151. Bramwell J. thought that, whatever the international legal classification of the zone, it prevented the rule from being treated as self-executing: *ibid.* at p. 150. Cockburn C.J. seems to have held that any international law rule would have been non-self-executing in English law, quite apart from the problem of innocent passage, because of the local jurisdictional problems: *ibid.*, p. 198. On this point Lush J. (at p. 239) expressly agreed. Kelly C.B., Pollock B. and Field J. agreed in general terms with Cockburn C.J. Of the minority, Lindley J. held that English law already protected the right of navigation (at p. 91), and that any necessary jurisdictional limitation might be incorporated from international law into English law (at pp. 94–6). Amplett J. (at p. 121) and, more tentatively, Grove J. (at pp. 113–14) agreed. On the other hand, Brett J. (with whom Denman J. agreed) was not troubled by the issue: at pp. 135, 144. Coleridge C.J. expressed his agreement with Lindley and Brett JJ., but his reasoning seems closer to Brett J.'s on this point: at p. 158. Cf. O'Connell, *loc. cit.* above (n. 1), p. 332.

<sup>4</sup> *Loc. cit.* above (p. 54 n. 4), p. 380.

There was no special quality in the territorial sea which would have excepted it from this scheme of government, and it is clear that the colonial territorial sea was not part of the United Kingdom. If it was Crown territory, it was certainly territory of the unitary Crown, but the idea of a shadowy 'Imperial Crown' standing in opposition to colonial government is contradicted by all the evidence.<sup>1</sup>

O'Connell concluded:

That the Crown possessed the coastal sea as royal waste in the seventeenth century is beyond question; and, although this view has not been effectively presented hitherto in face of Fulton's contrary opinion, it seems that the Crown's rights persisted in the eighteenth century unaltered in nature, although limited in spatial extent to the range of cannon, and later to three miles. From this it is arguable that the territorial sea up to this limit was within the national boundary . . . The endeavours of the seventeenth-century English jurists to legitimate the Crown's claims to maritime dominion by introducing the cosmopolitan concept of the law of nations necessarily resulted in an explanation of the Crown's rights in terms of *imperium* and *dominium*, which were the current expressions on the Continent for the integrated functions of government and possession. If the law of nations at that time did not authorize the government of persons not owing allegiance to the sovereign, except within the sovereign's own domains, it would seem to follow that the Crown's powers over coastal waters were regarded as dependent on the Crown's dominion thereof, and have remained so dependent in the absence of any constitutional change affecting the matter.<sup>2</sup>

Perhaps surprisingly, 'The Juridical Nature of the Territorial Sea' was by no means as overtly influential in the 'Tidelands' controversies of the 1970s as 'Problems of Australian Coastal Jurisdiction' had been in the 1960s. In the two subsequent cases decided by the High Court of Australia in which the interpretation of *Keyn's* case was an issue, a number of references are made to O'Connell's earlier work, but the 1971 article is nowhere cited.<sup>3</sup> And no literature of comparable quality with that produced in the 1960s has appeared.<sup>4</sup>

On the other hand, O'Connell remained professionally active in the field. He advised the Australian States in their challenge to the Seas and Submerged Lands Act 1973 (Cth.), which vested in the Commonwealth

<sup>1</sup> Ibid.

<sup>2</sup> Ibid., pp. 381-3.

<sup>3</sup> In *R. v. Bull*, (1974) 131 C.L.R. 203, the question was whether goods, seized within three miles of the coast, had been 'imported' into Australia within the meaning of the Customs Act. This was a matter of statutory construction not dependent on the application of *R. v. Keyn*, and that issue was expressly reserved by most of the judges. Barwick C.J., *obiter*, reaffirmed his earlier views: at pp. 216-19, 225-6. Stephen and Mason JJ. both referred to O'Connell's earlier work on Australian coastal jurisdiction: *ibid.*, pp. 270, 281. In *N.S.W. v. Commonwealth*, (1975) 131 C.L.R. 337, O'Connell's earlier work was expressly referred to only by Gibbs J. (at pp. 399, 401; but cf. Stephen J. at p. 442). Different issues were at stake in *A. Raptis & Sons v. South Australia*, (1977) 138 C.L.R. 346.

<sup>4</sup> O'Connell himself made two further contributions: 'Die Rechtsordnung der Meereszonen im Verhältnis von Bund und Gliedstaaten in Australia', *Jahrbuch für Internationales Recht*, 16 (1973), pp. 209-28; 'Bays, Historic Waters and the Implications of *A. Raptis & Sons v. South Australia*', *Australian Law Journal*, 52 (1978), pp. 64-71. Lumb (*The Law of the Sea and Australian Offshore Areas* (2nd edn., 1978), p. 183 n. 14) points out the difference between O'Connell's earlier and later views.

'sovereignty' over the territorial sea and 'sovereign rights' over the continental shelf, both exercisable by the Crown in right of the Commonwealth. He was junior counsel for Queensland in the case, though he did not argue. The dissenting judgments of Gibbs J. and (to a lesser extent) Stephen J. proceed along lines somewhat similar to those adopted by O'Connell in 1971, and may be the result of at least indirect influence on his part.

The decision of the High Court, upholding in its entirety the validity of the 1973 Act, was a bitter disappointment to him (though it involved the acceptance of his earlier suggestions).<sup>1</sup> Barwick C.J. repeated after argument the views he had already expressed. McTiernan and Mason JJ. also adopted the 'territorial' interpretation of *Keyn's* case. But novelties had not ceased, and Jacobs J. reinterpreted the concept of Crown rights in the sea bed (which, unlike the rest of the majority, he accepted) in a novel and challenging way, so that they became a form of *jura regalia* of the Imperial Crown in virtue of its pre-eminence as a nation, recognized but not conferred by the common law, and external to the territory of the Australian colonies.<sup>2</sup> That was enough, with an expanded interpretation of the external affairs power, to validate the 1973 Act.<sup>3</sup>

The problem of the Australian league seas has now been settled by legislation,<sup>4</sup> but the issues have continued to recur with quite surprising frequency.<sup>5</sup> At the time of his death O'Connell was advising the Newfoundland government in its claim to the off-shore resources of the territorial sea and continental shelf. Such a case would raise, in acute form, the conflict of view between Jacobs J., and Barwick C.J. and Mason J., in the High Court, as well as, perhaps, the correctness of the Supreme Court's adoption, in 1968, of O'Connell's now discarded opinion.<sup>6</sup>

<sup>1</sup> *N.S.W. v. Commonwealth*, (1975) 131 C.L.R. 337. On the territorial sea the majority was 5-2. On the continental shelf the Court was unanimous: in particular, Gibbs J. effectively scotched the argument based on appurtenance (at p. 416).

<sup>2</sup> *Ibid.*, pp. 484, 487-94. On the problem of the 'colonial royal waste', see also *per* Windeyer J. in *Bonser v. La Macchia*, (1970) 122 C.L.R. 177 at p. 221. But for contrary nineteenth-century practice, cf. O'Connell and Riordan, *op. cit.* above (p. 54 n. 3), pp. 329-67.

<sup>3</sup> Murphy J. seems to have adopted reasoning similar to that of Jacobs J. (at pp. 505-6), though he may have upheld the Act independently of the status of the colonial territorial sea, under the external affairs power: at pp. 503-4.

<sup>4</sup> By a rather complex legislative scheme, the Commonwealth has purported to confer on the States 'title' over and general legislative power with respect to the three-mile territorial sea: Coastal Waters (State Title) Act 1980; Coastal Waters (State Powers) Act 1980. The Acts apply to all Australian internal waters, and to the three-mile territorial sea, but not to any further extension of the territorial sea. They are stated not to affect the international legal status of the territorial sea or the rights and duties of the Commonwealth in relation to international law (in particular, innocent passage as defined in the 1958 Geneva Convention): s. 6. See also the Crimes at Sea Act 1979 (Cth.) and associated State legislation; and the Fisheries Amendment Act 1980 (Cth.).

<sup>5</sup> See, e.g., *D.P.P. v. McNeill*, [1975] N.I. 177 (C.A.), this *Year Book*, 48 (1976-7), pp. 335-7; *Yorigami Maritime Construction Co. Ltd. v. Nissho-Iwai Co. Ltd.*, 1977 (4) S.Af.L.R. 682; 1978 (2) S.Af.L.R. 391 (C.P.D.), noted Booysen, *South African Yearbook of International Law*, 3 (1977), pp. 184-203; *Pianka v. R.*, [1977] 3 W.L.R. 859 (P.C.).

<sup>6</sup> See, e.g., Harrison, *Osgoode Hall Law Journal*, 17 (1979), pp. 469-505; Swan, *McGill Law Journal*, 22 (1976), pp. 541-73.



3.3 CONCLUSIONS: FROM *KEYN* TO *PIANKA*

The centenary of *Keyn*'s case brought another divided and controversial decision on the problems of maritime jurisdiction. A majority of the Privy Council held that the jurisdiction of a Jamaican court had been extended to non-indictable offences in the territorial sea, by virtue of an extension of the bounds of parishes to three miles from the coast.<sup>1</sup> The reasoning is not entirely clear, but it bears a striking resemblance to some of the minority's reasoning in *Keyn*'s case. It provokes one to ask, again, what exactly that case did decide.

On the assumption that no binding or authoritative claim had been made by the legislative or executive to incorporate the territorial sea within the 'realm', there were four propositions, in *Keyn*'s case, which might have proved decisive one way or the other. The first, that the crime in its effect occurred on the *British* ship, was decisively rejected. The second was the proposition that international law then attributed the league seas to the coastal State *as territory* (rather than as a jurisdictional zone). As O'Connell saw,<sup>2</sup> a majority of the court agreed with this proposition: Lush J. thought the league sea was subject to dominion, but 'the dominion of Parliament, not the dominion of the common law'.<sup>3</sup> Bramwell J. expressed no opinion. In the result, seven judges decided the point in the affirmative with only five disagreeing.

The difficulty, on this view of international law (granted the right of innocent passage and assuming, as it was assumed, that the territorial sea was an attributed zone rather than one requiring to be claimed), was whether, in the matter of jurisdiction, international law was 'part of', that is, available to, English law; and if so, whether the rule was, as a matter of English law, self-executing so as to be capable of direct incorporation.<sup>4</sup> But this incorporation might have occurred in two ways. The 'realm', the subject of common law jurisdiction according to the statute of 13 Ric. 3, might have expanded, so as to bring the case within the jurisdiction of the court of oyer and terminer. But the decisive difficulty here was that the term 'realm' in the statute clearly referred not to the extent of the kingdom in international law but to the venue requirement for a common law jury—that is, it referred to land territory and internal waters, in other words, to the bodies of the counties (defined, at common law, by reference to that venue requirement). In *Keyn*'s case, only Grove J. seems to have thought that the court of oyer and terminer had jurisdiction, and even then, only

<sup>1</sup> *Pianka v. R.*, [1977] 3 W.L.R. 859, this *Year Book*, 49 (1978), pp. 261–2.

<sup>2</sup> Above, p. 55.

<sup>3</sup> (1876) 2 Ex.D. 63 at p. 239. In *N.S.W. v. Commonwealth*, (1975) 135 C.L.R. 337, Mason J. rejected this view, on the ground of Lush J.'s express agreement with Cockburn C.J.: at pp. 462–3. But Lush J. stated only that he agreed '*in the main* with the reasons' given by Cockburn C.J.: (1876) 2 Ex.D. at p. 238 (emphasis added).

<sup>4</sup> On the effect of innocent passage in this context, cf. *supra* p. 56 n. 3.



concurrent jurisdiction.<sup>1</sup> Alternatively, the international law rule might in some way have 'affected' the Admiral's jurisdiction so that it extended to foreign ships within the territorial sea. The great difficulty here was that (apart from piracy) the Admiral's criminal jurisdiction had never been thought to extend to foreign ships, nor had it ever been suggested that the jurisdiction was enlarged in the territorial sea. This difficulty was exposed, if not caricatured, by Cockburn C.J., who described the asserted jurisdiction as 'amphibious'.<sup>2</sup> In his view, the Admiral's jurisdiction never was exercised over foreign ships:

Nor, for the reason already given, could such jurisdiction be so exercised consistently with legal principle.<sup>3</sup>

But the 'reason already given' was the impropriety of exercising extra-territorial jurisdiction over foreigners,<sup>4</sup> and it is here that Cockburn C.J. fails to confront the arguments of Brett and Lindley JJ. For they attempted, in slightly different ways, to reformulate the rule governing Admiralty jurisdiction so as to allow its extension to foreign ships on the territorial sea in cases such as this. How they did so is instructive.

Lindley J. begins by distinguishing the question of property in the league seas: there is high authority in favour of these being within the 'realm of England', the 'dominion of the Crown', indeed, for their being 'property of the Crown'; but the case only involves the ambit of criminal law and jurisdiction.<sup>5</sup> The statutes transferring the Admiral's jurisdiction to commissioners are then cited: although these did not (as to persons or place) amplify that jurisdiction, their width of language showed that it had been, and continued to be, 'as wide as it could be'.<sup>6</sup> This jurisdiction is to be presumed to parallel the substantive criminal law, which has been made 'applicable over the high seas so far as it was competent for Parliament to make it'.<sup>7</sup> The only question is, how extensive could the jurisdiction be?

... there being no other limit than that set by international law, these limits must be sought for amongst the recognized authorities on that branch of jurisprudence.<sup>8</sup>

Similarly, Brett J., having expressly decided that the realm, in its general sense, included the league seas, presumes that some jurisdiction must exist to try crimes against the laws thereby extending. The Act of 13 Ric. 3 defining admiralty jurisdiction limited it to matters 'done upon the sea' beyond the counties but no further, nor were such limitations at issue

<sup>1</sup> (1876) 2 Ex.D. 63 at pp. 115-17. Phillimore J. thought it a 'grave question', but expressed no opinion: at p. 68. For O'Connell's slightly different reading, see loc. cit. above (p. 54 n. 4), p. 329.

<sup>2</sup> (1876) 2 Ex.D. 63 at p. 198, and cf. pp. 229-30. The point is made by Gibbs J. in *N.S.W. v. Commonwealth*, (1975) 135 C.L.R. 337 at p. 396.

<sup>3</sup> (1876) 2 Ex.D. 63 at p. 169.

<sup>4</sup> Ibid. at p. 160.

<sup>5</sup> Ibid. at p. 86.

<sup>6</sup> Ibid. at pp. 87, 88.

<sup>7</sup> Ibid. at p. 88.

<sup>8</sup> Ibid. at p. 89.

in the dispute between the common law and the Admiralty. Both the statute and Coke's commentary on it assume the Admiral 'had jurisdiction to administer the law of England to everything done on the seas to which the law of England was properly applicable'.<sup>1</sup> Since it was, by international law, 'properly applicable' to foreign ships in respect of offences of this kind, both Lindley and Brett JJ. held that the court had jurisdiction. International law was thus used as a criterion for construing the ambit of Admiralty jurisdiction as established by the relevant statutes and rules of law. This may well attribute to international law an effect it ought not to have in matters of jurisdiction,<sup>2</sup> but it was by no means incoherent.<sup>3</sup>

Although the point was not expressed very precisely by Cockburn C.J., this argument must have been rejected in *Keyn's* case, since the court held, by 7 to 6, that the Admiral's jurisdiction did not extend to *Keyn's* acts. As the only one of the four propositions decided by anything like the actual deciding margin in the case, it has an overwhelming claim to be considered its *ratio decidendi*.<sup>4</sup> If so, its authority as such may be lessened by two facts. First, the slightly more general proposition—that the territoriality of the league seas was ineffective to give the court jurisdiction either as a court of oyer and terminer *or* as successor to the admiral's jurisdiction—resulted in an equally divided court (6–6), since on the former issue Phillimore J. expressed no opinion.<sup>5</sup> Secondly, the reasoning of the majority in *Pianka's* case closely parallels that of Brett and Lindley JJ., since the proper extent of jurisdictional authority of the forum in international law was used there to determine the ambit of the substantive law and to create a presumption of a parallel extension of jurisdiction by the relevant statute.<sup>6</sup>

#### 4. INTERNATIONAL LAW AND NAVAL POWER

A third area of international law which particularly interested O'Connell was the problem of the application of international law to naval operations. His interest was dual, since he was a serving officer in the Australian and

<sup>1</sup> Ibid. at p. 146.

<sup>2</sup> It is of interest that Lindley J. in this context referred to 'Lord Mansfield's observations in 3 Burr. 1471' (at p. 91). The citation is obviously mistaken; it should have been 3 Burr. 1481, i.e. to Lord Mansfield's famous *dictum* in *Triquet v. Bath*, (1764) 3 Burr. 1478 at p. 1481, that the law of nations is 'part of the law of England'. This is the only express reference, in *Keyn's* case, to the principle of incorporation.

<sup>3</sup> The novelty with it was the incorporation of international law as an ambulatory jurisdictional formula, rather than as a means of interpreting, so as to be consistent with international law, a particular legal rule (a technique which Cockburn C.J. approved ((1876) 2 Ex.D. 63 at p. 210) but denied could operate in a 'progressive' or ambulatory way (at p. 211)).

<sup>4</sup> As O'Connell saw; above, p. 55.

<sup>5</sup> Above, p. 60 n. 1.

<sup>6</sup> [1977] 3 W.L.R. 859 at pp. 867–9 (Lords Wilberforce, Morris and Fraser). Cf. the joint dissent of Lords Simon and Russell at pp. 875–6, referring to the undesirability, in 1891, of the general extension of *summary* jurisdiction over foreign ships in passage through the territorial sea. For the majority, the problem of innocent passage was removed by the implementation (in 1971), as part of the local law, of Art. 19 of the Geneva Convention on the Territorial Sea: at pp. 866, 870. This is itself a form of progressive interpretation.

later the Royal Naval reserve, and in that capacity gained a considerable insight (as far as professional international lawyers are concerned, virtually a unique insight) into the practical aspects of naval operations. His fascination with the sea and the navy were obvious in his constant, happy, use of technical terms and abbreviations, and in his attempt to promote 'an interchange of ideas between international lawyers and naval officers'.<sup>1</sup> Indeed, this was his primary theme: the neglect by each profession of the perspectives and problems of the other was harmful to both. In his major, and the leading, work on the subject, *The Influence of Law on Sea Power*, he concluded:

It is no longer sufficient to leave the law to Foreign Ministries. Naval staffs must themselves be equipped to handle the legal aspects of naval planning, whether it be in the matter of drafting rules of engagement or in their interpretation. The machinery must be devised for rapid appreciation of the legal issues and equally rapid reaction if the theory of self-defence is to be effectively translated into terms of sea power. Above all, reflection must develop concerning the ways in which working technology influences the modes of self-defence and the ways in which the intensifying ambiguities of the law of the sea influence the decisions respecting self-defence. This calls for a continuing dialogue between lawyers who know enough of what goes on in the operations room of a warship and naval officers who have sufficient awareness of the advantages and inhibitions of the law to bring the necessary professional insight into the influence of law on sea power.<sup>2</sup>

In keeping with this primary aim, much of his work in this area (all of it written in the last decade of his life) was of an exploratory, tentative nature; it is accordingly rather difficult to discuss in any definite, thematic way. His aim was more to start a dialogue and to expose the problems than to lay down clear-cut conclusions.<sup>3</sup> The gaps in the documentary record, and the uncertainties created by a rapidly changing law of the sea, made this largely inevitable. In the event, there is no doubt that he was successful in opening up the area to detailed study and debate, however controversial his own approach may have been.<sup>4</sup> Three aspects of his contribution to that debate may be mentioned here.

#### 4.1 THE USE OF NAVAL FORCE IN LIMITED WAR BEYOND THE TERRITORIAL SEA

His one distinct and novel substantive argument was suggested in the first extended discussion of the topic, 'International Law and Contemporary Naval Operations', in this *Year Book*. There he proposed the hypothesis

<sup>1</sup> 'International Law and Contemporary Naval Operations', this *Year Book*, 43 (1970), pp. 19-85 at p. 20.

<sup>2</sup> *The Influence of Law on Sea Power* (Manchester, 1975), p. 189. The original version of the book was given as the Melland Schill Lectures in 1974.

<sup>3</sup> *Ibid.*, pp. xiv-xv.

<sup>4</sup> For criticism, not always convincing, of O'Connell's position as a variety of 'Anglo-American navalism', cf. K. Booth, in J. K. Gamble (ed.), *Law of the Sea: Neglected Issues* (1979), pp. 328-97 at pp. 334, 342-3. For other recent literature, *ibid.*, pp. 394-7.



... that, except on occasions when the balance of deterrence which exists between the great Powers is threatened, as at the time of the Cuba Quarantine operations, hostilities not amounting to war must be confined to the territorial sea, or at least to the contiguous zone. The understanding appears to be that limited war must not escape beyond the territories of the contending parties so as to threaten the delicate balance of international relations. Hence it must not be carried into the high seas, where international interests are directly engaged.<sup>1</sup>

He tested this hypothesis by examining the operations in the Middle East (in particular, the dispute over the sinking of the Israeli destroyer *Eilat* in 1967—a dispute which came down to a disagreement over whether the destroyer was within the Egyptian territorial sea at the relevant time), Vietnam (where hostilities were substantially limited to the twelve-mile zones of the two States) and Algeria (where French action was not of course so limited, but which was clearly ‘aberrant’).<sup>2</sup> His proposed rule was perceived not as a rule independent of the requirements of self-defence and proportionality but as a reflex of them. Nor was it absolute:

An hypothesis that might serve to minimize the threat to the peace which results from situations of limited hostilities would be that no belligerent acts are permitted on the high seas except in case of immediate and direct self-defence.<sup>3</sup>

He returned to the argument in 1975, with an extended and accurate criticism of Anglo-French policy in the Spanish Civil War.

The point of departure for the modern effort to confine limited war to national territory and keep it off the high seas was the Spanish Civil War, but the relative bankruptcy of the policy of non-recognition of belligerent rights then, and the escalation of violence that the Royal Navy believed resulted from that decision, makes it questionable whether sustained hostilities can be so contained, and whether the law should attempt to contain them in this way.<sup>4</sup>

In that case,

... the source of the difficulties ... was the refusal of Great Britain and France to grant belligerent rights while involved in an effort to restrict the Nationalists beyond what traditional international law required. The blockade-running was the type of act which belligerents were legally entitled to defeat, and when they were deprived of the means of doing what the law allowed them to do the safety valve was removed.

This was clearly recognised by the Royal Navy, which throughout the whole episode exhibited an instinct for the exigencies of the law and a prudence and discretion that were not always evident in the higher levels of policy-making.<sup>5</sup>

Dismissal of the Spanish and Algerian cases left the Vietnam war as the substantial precedent on which the restrictive argument could be based. But in 1975 his treatment of Vietnam was much more reserved and cautious. Although in Vietnam ‘scrupulous regard [was] paid to the

<sup>1</sup> Loc. cit. above (p. 62 n. 1), p. 26.

<sup>2</sup> Op. cit. above (p. 62 n. 2), p. 124.

<sup>3</sup> Loc. cit. above (p. 62 n. 1), p. 82.

<sup>4</sup> Op. cit. above (p. 62 n. 2), p. 115.

<sup>5</sup> Ibid., p. 122.

territorial sea or contiguous zone limits as the boundaries of military action',<sup>1</sup> that restriction was now seen to derive more from the structure of that war, and the operational balance of advantages, than from any more general proposition.

No incidents involving international shipping occurred on the high seas, and upon the only occasion when hot pursuit occurred it was terminated on the high seas without further gunfire—a trivial concession to make to ensure the operational freedom of the high seas for the Seventh Fleet.

The law in this case facilitated the naval objectives of the United States and its allies, and its promotion and reinforcement thus became an aspect of naval policy . . . A self-denying ordinance on the part of each side stabilised the twelve-mile limit as the boundary of hostilities, although not of manoeuvre. The *quid pro quo* for the United States allowing free passage to Haiphong was that North Vietnam refrained from any assault upon the fleet, which could have marked the point of escalation to a dangerously high level, wherein foreign shipping, and notably Russian, would very likely have become involved. The essence of the matter was that until the final moves were made in the Vietnam War to bring it to a halt, the freedom of the seas facilitated North Vietnam and its supporters no less than the United States.

Until the mining of Haiphong towards the end of the war, then, a balance of interests sustained the twelve-mile limit as the extremity of the war zone, but inevitably the presentation of the matter was put upon the basis of law—that the right of self-defence restricts the areas of conflict to the territories of assailant and victim, that the international community is to be insulated from the exercise of that right since it is not a legitimate object of it, and that the principles of necessity and proportionality would not justify interference with shipping on the high seas, except to counter immediate threat. The law thus played a useful role in the evolution of the operational concept, but the question is whether the conduct of the parties testifies to the recognition of a rule of law confining limited war to the territorial sea, or to mere exigency.<sup>2</sup>

On this account the latter conclusion was more likely than the former, and O'Connell's 'evaluation' of his earlier hypothesis was very cautious indeed:

Where it suits naval planning to preserve the high seas as an area immune from hostilities wherein forces may assemble, replenish and mount operations, the promotion of such a rule of law becomes an objective of naval policy, and this will be reflected in the type and scope of operational orders—as in Vietnam. Where restriction of belligerency to the territorial sea would be operationally inconvenient, naval staffs will wish to take a different view of the law, but they would be rash to overlook the questionable state of the law on the point, which accordingly will introduce an element of doubt and hence of hesitation and indecision into the planning process. Either the question of law will advance naval purposes or it will hinder them. Certainly it will influence them. But the danger of reliance upon precedent, to which governments and naval staffs are just as prone as lawyers, should not be overlooked. All the naval operations discussed in this chapter are

<sup>1</sup> Op. cit. above (p. 62 n. 2), p. 125.

<sup>2</sup> Ibid., p. 126.

peculiar, none more so than Vietnam, where favourable operational conditions existed that are unlikely to be repeated. The examination of the matter is valuable only if the special circumstances are recognised, for only then can the consistent links between the episodes be evaluated for the purpose of formulating behavioural rules.<sup>1</sup>

As one perceptive reviewer pointed out, this marked a withdrawal from rather than an affirmation of the position suggested in 1971;<sup>2</sup> and the withdrawal was taken further in O'Connell's essay, 'Limited War at Sea since 1945'.

Whether or not the restriction of naval operations to the territories, or at least the waters adjacent to the territories of the combatants, is a matter of law or merely a matter of political self-denying ordinance, it is a characteristic of the limited goals of contemporary conflict. How strictly the restraint is observed will obviously depend upon the geographical location and the political circumstances. In Vietnam the United States was under great political constraint, both internationally and at home, as to the nature of the conflict, and hence as to its location. It was politically necessary to put the whole matter on the basis of law-enforcement, and to avoid the appearance of retaliation or reprisal. In the Indo-Pakistan conflict of 1971 there were far fewer inhibitions because world sympathy had been engaged in favour of the independence of Bangladesh. The differing circumstances are reflected in the different naval policies adopted in the two cases.<sup>3</sup>

What had emerged was a distinction between isolated incidents and continuing conflicts. In single cases such as the *Eilat* sinking, the indices of 'armed attack' or 'hostile act' required, at least, an unexplained naval intrusion into territorial waters, since there could have been no justification for attacking naval units on the high seas. On the other hand, in continuing conflicts any limitation of military action to the twelve-mile zone was rather a self-denying ordinance or convenient arrangement than a requirement of self-defence. The use of a carrier on the high seas as a base for the bombing of North Vietnam would quite clearly have justified action against the carrier itself, if North Vietnam's general position had been one of self-defence. It was the consequences of such action, in terms of escalation of the conflict, that acted as a restraint.

In *The Influence of Law on Sea Power*, the ways in which the problems of self-defence interacted with those of transit rights and the protection of neutral shipping were clearly presented. The question of neutral rights, in particular, was of great importance but had been woefully neglected. The failure of the law of belligerent rights, in the Spanish Civil War, Algeria and the Indo-Pakistan war of 1971, created another problem.

Some international lawyers even go so far as to say gaily that there is no such thing as a law of neutrality in the era of the United Nations, because there is no

<sup>1</sup> Ibid., pp. 130-1.

<sup>2</sup> Richard Hill, in *The Times Literary Supplement*, 27 August 1976, p. 1062.

<sup>3</sup> 'Limited War at Sea since 1945', in M. Howard (ed.), *Restraints on War. Studies in the Limitation of Armed Conflict* (1979), pp. 123-34 at pp. 126-7.



legal condition of war. It may well be that the prohibition of the use of force 'inconsistent with the purposes of the United Nations' has deprived belligerents of the rights which they previously possessed against neutrals, such as the right of visit and search on the high seas and seizure of contraband discussed in chapter IX, though even this must be regarded as doubtful, since naval blockades of a sort continue to be mounted; but to say that the converse is true—that neutrals have no rights—would be to leave them the unprotected victims of violence and would be retrogressive and hardly consonant with the aspirations of contemporary international law.

The extent to which neutral ships have been affected by naval operations in recent years makes it necessary to reassert the rights of neutrals to immunity from interference, attack and damage, and to compensation when these occur. The fact that the flag States of neutral ships sunk or damaged in the Indo-Pakistan and Middle East wars were often indifferent to the question of legal liability is not to be taken as indicating any attitude towards the State practice that contributes to international law. It is due to the system of insurance and reinsurance, whereby the loss is discounted. . . . The point is that flag-of-convenience States have no interest, apparently, in protecting their ships, and this means that the traditional pressures on belligerents to avoid harm to neutrals, which was such a prominent feature of the war diplomacy of the past, are not so evident or persistent. Because of this, belligerents are less inclined to be restrained by the presence of neutral ships, and the possibilities of violence at sea are enhanced. The conditions for proliferation of disorder are thus created by the practices of the world community. The likelihood of the major naval Powers being themselves involved in war at sea is less than that they will be neutral in wars between lesser or even trifling Powers. The Indo-Pakistan war portended the problems of neutrality with which major naval Powers could be faced. For, if it is now a rule of international law that belligerent operations may not be conducted on the high seas, or neutrals subjected to measures of blockade conducted outside the territorial sea, the neutral naval Powers will have to enforce the rule by escorting their shipping. The lessons of the Spanish Civil War are quite likely to be repeated in this increasingly unstable world.<sup>1</sup>

#### 4.2. THE PROBLEM OF SELF-DEFENCE

Underlying most of this discussion was the pervasive role of self-defence. O'Connell did not doubt its importance: indeed, he seems to have developed a comparatively restrictive view of its scope.<sup>2</sup> If his work in this field lacked a full-scale examination of the ambit of, and restrictions on, the right to self-defence in international law, this was due to his clear perception of the way in which, in practice, both parties to a conflict would tend to rely upon it. In that case, provided neither argument was entirely implausible, international law might cease to play a restricting role other than through a subsequent global characterization of the conflict (a characterization which would depend on obscure or controverted facts,

<sup>1</sup> Op. cit. above (p. 62 n. 2), pp. 160-1.

<sup>2</sup> There is no connected account of the law relating to the use of force in his *International Law* (2nd edn., 1970). On self-defence see vol. 1, pp. 315-20 (a brief and tentative statement in a chapter on 'The Legal Concept of the State').

which was unlikely to be authoritative, and which might well be politically motivated). Hence his emphasis shifted from the substantive requirements for invoking self-defence to the related rules of proportionality and restrictive response.<sup>1</sup> It was these which offered some hope that the law might be able to restrain the parties; these were the necessary components of a system of limited war.

It is necessary to cut right through this thicket and clutch two central features that are politically irremovable, however much they may be gnawed into by legal exegesis. These are, first, that Article 2 (4) is a catch-all clause which forbids the use of actual force altogether, and that such arguments as were floated during the Cuban 'quarantine' crisis—that interference with ships is excluded from it because not directed at political independence or territorial integrity—will not convince many delegations in the United Nations who like to see things in simple terms when they have no motive for complexity or sophistry; and secondly, that nations will invoke self-defence, and mostly get away with it, whatever the quibbles of the lawyers about whether the rights arising under Article 51 are limited to cases of clear violations of Article 2 (4), or whether Article 51 is in substitution for older doctrines of self-defence, qualifies or modifies them, or is the sole source of the right of self-defence.<sup>2</sup>

Once the benefits of self-defence accrue to a party, the idea that the measures of defence must be proportional to the assault does not mean that the victim must fight his defensive battle on the opponent's terms, but on the contrary warrants his moving to a higher mode of weaponry and to a greater degree of firepower. At the same time, if the political advantages of legality are not to be sacrificed, the level of response, while it may be further up the scale of force, must not be altogether disproportionate to the threat. It follows that at each level the graduations of force must be discriminating, and therefore deliberate, with clearly defined and limited goals in view.<sup>3</sup>

Two specific aspects of the restraints entailed by a plausible claim to self-defence may be mentioned. The first is the vexed problem of anticipatory self-defence. In his 1971 article, O'Connell had supported a form of anticipatory self-defence, not as an exception to the Charter rules or by way of retreat to some earlier primordial right to use force,<sup>4</sup> but by interpretation of Article 51 itself:

The real question which confronts naval planning staffs in situations of limited hostilities is what constitutes an 'armed attack' within the meaning of Article 51. When later in this paper tactical considerations are examined it will become evident that, in certain situations, to await the launching of a controlled projectile from a potentially hostile contact before exercising the right of self-defence may well be to lose the capacity of self-defence, for whoever employs his weapon first may have a pre-emptive advantage which can prove decisive. For Article 51 to be realistically utilized, therefore, the naive expression 'armed attack' must be refined to take into account the factor of the capability of weapons. In some

<sup>1</sup> Op. cit. above (p. 62 n. 2), pp. 54–7.

<sup>2</sup> Ibid., p. 54.

<sup>3</sup> Ibid., p. 55.

<sup>4</sup> Though there are traces of this approach in *International Law* (loc. cit. above, p. 66 n. 2).

situations, for example, it is arguable that the moment of armed attack may be the moment when the contacted vessel's radar 'locks on' in a firing position, not when a projectile is launched.<sup>1</sup>

In *The Influence of Law on Sea Power*, however, a more detailed examination of 'the capability of weapons' and the indices of self-defence led to a different, though still tentative, conclusion. The absence of any clear indication of a submarine's preparations for attack<sup>2</sup> makes implausible the case for pre-emptive measures. The same applies to other potentially hostile craft.

Experimentation with technical and tactical indications of the translation of 'hostile intent' into 'hostile act' is generally thought to have been unsuccessful because the indices, from a purely naval point of view, do not yield a sufficiently fine definition or operate with the requisite certainty. Some of these indices, such as the opening of a missile housing on a patrol boat, depend on visible apprehension, which is unlikely to be available; others depend on electronic information which, especially in a moment of excitement, but always in conditions of atmospheric or sonar aberration, may, because of anomalous propagation or human error, give false or ambiguous responses that may be taken as indications of enemy action. Sonar classifications, in particular, are unreliable. And since a combination of indices is relied upon, their coincidental detection is likely to be fortuitous rather than assured.

In the absence of more precise tactical indications of an intended hostile act, naval thinking is returning to its point of departure some twenty years ago, that weapon systems may be activated in self-defence only in response to the discharge of a projectile by the other side. The implications are that in the exercise of sea power one must expect to sustain an initial casualty before going into action under the cover of self-defence; that a single-unit operation will be ruled out because the fragility of modern warships, which are built to evade and not to sustain damage, makes them excessively vulnerable to any form of first strike; and that the fact that the threat the unit poses could be eliminated in one blow may tempt a degree of escalation that would not be contemplated if other units were present and available for instant and overwhelming retaliation. It follows that the conclusions reached on the problem of self-defence will dictate the scale of superior force, together with the attendant fleet dispersal and logistic considerations.<sup>3</sup>

In a later essay the point was made more bluntly:

The side which opens fire first is likely to lose the political advantage of plausibly invoking self-defence, and so the game requires that the other side takes that initial step. So from harassment to collision, to low-level gunfire, to high-level gunfire, and to missiles, provides a logical ladder of the resort to force, the rungs of which will be climbed alternately by the parties to the dispute. The 'Battle of the Paracels' between the Chinese and South Vietnamese navies in 1974 followed just this pattern, with both sides invoking self-defence in the resulting diplomatic exchanges.<sup>4</sup>

<sup>1</sup> Loc. cit. above (p. 62 n. 1), pp. 24-5. See further, *ibid.* pp. 63-4, and for a rather equivocal conclusion, p. 83.

<sup>2</sup> Op. cit. above (p. 62 n. 2), pp. 71-9, especially at p. 79.

<sup>3</sup> *Ibid.*, pp. 82-3. See also pp. 84, 181-5, where he spells out the consequences for procurement and training of this conclusion.

<sup>4</sup> Loc. cit. above (p. 65 n. 3), pp. 130-1.



A second problem was that of the permissible use of long-range unguided missiles—such as cruise missiles—in conditions of limited war. In 1972 he argued persuasively that the indiscriminate way in which such missiles were likely to operate in practice made it very difficult to justify their use:

In the case of missiles which are not guided, the considerations differ from those in the case of guided missiles. Since the target may not have been isolated sufficiently from other shipping by the launching ship; during the flight-time of the missile the target may have moved several miles and another large ship, perhaps a neutral tanker, may have entered the zone; and the missile is indiscriminating with respect to the target it selects, the use of unguided missiles, particularly in areas of the sea which are dense traffic routes, would seem to constitute a danger to shipping which is protected by international law. In the case of submarine-launched missiles, their use might amount to unrestricted submarine warfare in a new guise.

This is a matter that should be of serious concern to the shipping nations which are likely to be neutral, and particularly those with substantial tanker traffic (because of the tanker's size). The development of the weapon discussed is in its early phases, and, as mentioned above, there are indications that the Soviet Union is returning to shorter-range missiles, perhaps because the technological problems of targetting with the medium-range missiles have proved too great. But the weapon is extensively deployed, and until accurate targetting at long-range is achieved it will remain a major threat to civilian and neutral shipping in the event of its use.<sup>1</sup>

The point was demonstrated by the apparently unintentional sinking, without warning, of the Liberian ship, *Venus Challenger*, in 1971, during the Indo-Pakistan war. The indiscriminateness of such missiles meant that:

Except at the highest level of escalation and in global total war, when the neutral can be politically discounted, it is inconceivable that the present generation of beyond-horizon cruise missiles could be used responsibly in limited war. The wide spectrum of doubt respecting the occasions and mode of their use make the planning for their deployment exceptionally difficult, and to this extent the requirement to respect the neutral, which gains normative form in the law, has a bearing upon procurement policy, not to speak of the writing of rules of engagement.

At the same time it is a distressing symptom of the tolerance currently accorded to high levels of violence that incidents such as the destruction of the *Venus Challenger* are apparently shrugged off by neutral governments which ought to have a vital interest in the security of their shipping . . . The least that can be urged is that the problem of the cruise missile be taken up in the disarmament machinery before it is too late—before, that is, as a result of proliferation by gift or sale, these weapons are in the hands of many navies which belong to relatively insignificant nations in highly volatile areas of the world and on the flanks of the major shipping routes.<sup>2</sup>

<sup>1</sup> 'The Legality of Naval Cruise Missiles', *American Journal of International Law*, 66 (1972), pp. 785–94 at pp. 793–4.

<sup>2</sup> *Op. cit.* above (p. 62 n. 2), pp. 89–90.

#### 4.3. THE ROLE OF INTERNATIONAL LAW IN THE EXERCISE OF SEA POWER

A brief account such as this cannot do justice to the range of O'Connell's concerns in this field. Problems such as the right of warships to innocent passage through the territorial sea, the mode of innocent passage of warships and, especially, submarines, and transit passage through straits and archipelagos were discussed, usually in a vivid and interesting way.<sup>1</sup> There was, throughout, an attempt not only to expound international legal aspects of the subject to the non-lawyer but also to describe and explain the technical aspects of naval power to the (usually uninformed) lawyer. His knowledge of these aspects was considerable; even more comprehensive was his understanding of the various incidents involving the use of force at sea in this century. A particular favourite was the naval, political and legal battle of the River Plate, leading to the scuttling of the *Graf Spee* in December 1939, a story twice told whose intrinsic fascination clearly outweighed the moral to be extracted.<sup>2</sup>

But the moral underlying this and all his work was still the inescapable relevance of the law to the naval commander (and his political superior):

[F]or naval power to be used effectively for the resolution or promotion of international disputes, the seizure of the advantages afforded by the rules of international law is central to the concept of operations; for the freedom of the seas is not absolute, nor is it coextensive with the areas in which ships can navigate. Questions of the extent of national jurisdiction over the surface of the sea or of the sea bed, protection of ships, rules of the road and rules about installations and pipelines qualify the freedom of naval deployment. In as much as these questions are often controversial in the answers they afford, they offer advantages to those who wish to manipulate them; and in as much as their controversial character can itself be the occasion of dispute or can transform some other issue into a different category or level of dispute, they can become the causes or the objectives of naval power. The law thus plays a central role in clarifying by way of restrictions the goals set for sea power, the range of available options for its exercise and the classification of situations whose indeterminate character could otherwise lead to diffusion of energies and resources.<sup>3</sup>

The tendency in more recent literature has been to deny, or at least to minimize, this relevance, but critics have in general not perceived the

<sup>1</sup> In addition to the works cited already see: 'Innocent Passage of Warships', *Thesaurus Acroasium*, 7 (1977), pp. 405-51; 'Resource Exploitation, The Law of the Sea and Security Implications', in Bertram and Holst (eds.), *New Strategic Factors in the North Atlantic* (1977), pp. 160-8; 'Transit Rights and Maritime Strategy', *Royal United Services Institute Journal*, June 1978, pp. 11-18. On transit through archipelagos, see 'Mid-Ocean Archipelagos in International Law', this *Year Book*, 45 (1971), pp. 1-77 at pp. 69-75.

<sup>2</sup> It is told in *The Influence of Law on Sea Power* (1975), pp. 27-39, and (more entertainingly) as 'A cause célèbre in the Law of Maritime Neutrality: Hague Convention No. XIII', in *Um Recht und Freiheit. Festschrift für Friedrich August Freiherr von der Heydte* (1977), pp. 437-47.

<sup>3</sup> Op. cit. above (p. 62 n. 2), p. 4.

subtlety and variety of ways in which O'Connell saw the law's influence at work.<sup>1</sup>

The Cuban Missile crisis, for example, though 'exceptional' as a conflict between the two major powers, demonstrated the use of law as a means of communicating limited aims between conflicting States:

There may not seem to have been much law in this singular event, but poker is not played without rules. The fact that the lawyers were prominent in the group surrounding the President during the crisis is sufficient testimony, of itself, to the influence of law upon events, and it is known that the legal consultations covered both the overall framework within which action was taken, including the justifications and presentation for world opinion, and the technical details of visit and search, boarding and the degree of force to be used to compel submission. It is at this lower level that the law took on more concrete characteristics and was not mere political window-dressing.

...

The other lesson of the Cuban quarantine is that the exercise of sea power is apt to be strictly localised and governed by various rules of law respecting the areas of national and international jurisdiction. If the response is made in an area removed from the scene of an initial thrust, and in an altogether different mode, this would represent a degree of escalation that would not only be excessively dangerous but would tend to lack the characteristics of self-defence, thereby depriving the responding State of the political advantages of apparent legality. The essence of limited hostilities is that if they are to be rationalised on the theory of self-defence they will be limited as to theatre as well as to type, and this restriction is necessary if the progression to general war, which would in previous epochs have been thought inevitable once the process of escalation had commenced, is to be discounted in advance.<sup>2</sup>

On the whole, the estimate seems a fair one.<sup>3</sup>

In less abnormal situations, the law continued to operate in a variety of ways. The need to placate neutrals required a degree of respect, or at least caution, even for excessive claims. Law could assist in a choice of means (and the need for restraint and proportion ought itself to influence the procurement policies of navies). Proportionality entailed the limitation of conflict to the particular region or area. A tenable legal position, supported by a firm display of superior force, placed the onus

... on the other party, even when the overall legal situation is controversial, of moving to a condition of still higher level of force, wherein the legal situation is likely to become even more controversial. Escalation of force is normally accompanied by escalation in legal ambiguity. The decision to move to a higher level of force is never one to be taken lightly, and the accelerating insecurity respecting one's position that inevitably results from the progressive dissolution of the boundaries of legal clarity is itself a curb upon the policy makers.<sup>4</sup>

<sup>1</sup> It is interesting that, although *The Influence of Law on Sea Power* (1975) was generally well reviewed, the two most perceptive (and favourable) reviews were written by serving naval officers: see Hill, loc. cit. above (p. 65 n. 2); Davidson, *Military Law Review*, 7 (1978), pp. 202-5.

<sup>2</sup> Op. cit. above (p. 62 n. 2), pp. 62-3, but cf. p. 57.

<sup>3</sup> For a more affirmative view, see the interesting study by A. Chayes, *The Cuban Missile Crisis* (1974) (which was not cited). A recent general account is D. Detzer, *The Brink. The Cuban Missile Crisis of 1962* (1979).

<sup>4</sup> Op. cit. above (p. 62 n. 2), p. 60.



Legal uncertainties might deprive proposed action of an 'element of security and credibility' which was 'not necessarily disadvantageous, for it may lead to hesitation on both sides, and so to the avoidance of conflict'.<sup>1</sup> At least, law was a weapon in the armoury, not to be neglected:<sup>2</sup> depending on the structure of the particular conflict it might be more.<sup>3</sup> In any event, law would be used as a form of justification or excuse: it was important, then, that the law be considered in advance, lest action be taken that could on no view be legally justified or excused.

The point, then, is not whether the law is breached but how it enters into the decision to breach it, what value it has in the circumstances compared with other values, and what influence it is allowed to have. It does not cease to be the law merely because it is relegated to a low level of priority, but neither should it be presumed that it will be so relegated.<sup>4</sup>

In all of this, it seems a reasonable guess that O'Connell had in mind the two conflicting schools of naval thought, with respect not only to rules of engagement but to the entire scope of his study:

Among naval officers there are two widely divergent points of view. The 'Nelson touch' school considers that tight rules of engagement will inhibit a commander on the spot from taking the requisite initiatives to achieve the objective of his orders. It is said that every commander knows that he can be politically disowned and his career affected if he has to be aggressive in executing his orders, but that is his traditional risk, and a navy which does not take initiatives consistent with political objectives is incapable of the effective use of sea power. It is pointed out that even in the cod wars the rules of engagement have been stretched and that policy was best served by doing so. This school views the rules of engagement with some suspicion.

The other school recognises the subservience of navies to political direction and the need for clear political responsibility for any breach of international law. In the situation where naval forces are despatched for purposes of catalytic sea power it is recognised that governments often do not wish to be committed. In these circumstances the 'Nelson touch' has no place. The history of the matter reveals that, as in the Spanish Civil War, the navy has to be circumspect—indeed, more so than the political branch of government, for the boldness which is appropriate in conditions of open warfare may only lead to escalation for which naval staffs have neither the resources nor the disposition. There is no public servant with such means of involving his government in international complications as the naval officer, and his responsibility is commensurate with the facilities at his disposal.<sup>5</sup>

In any situation short of unlimited war there can be no doubt which view O'Connell thought not merely right but inevitable.

An understanding of the legal environment is as much a need for the naval

<sup>1</sup> *Op. cit.* above (p. 62 n. 2), p. 113 (though the consequences of inaction might be unpredictable: p. 112). Cf. also p. 138.

<sup>2</sup> *Ibid.*, pp. 164, 168. And cf. this trenchant uncharacteristic comment (p. 3): 'International law may be considered by some to be a simulacrum of law, but it is a phenomenon notwithstanding'.

<sup>3</sup> As in South Vietnam: *ibid.*, pp. 132-4.

<sup>4</sup> *Ibid.*, p. 52.

<sup>5</sup> *Ibid.*, p. 179.

officer as an understanding of the physical environment, since in operating in the one he necessarily operates in the other.<sup>1</sup>

## 5. O'CONNELL AND THE METHOD AND FUTURE OF INTERNATIONAL LAW

These three areas of O'Connell's work have been selected for more detailed treatment because of the substantial contribution he made to each, and because of the way in which he became involved in a continuing debate on the issues. But they by no means exhaust the range of his interests or influence. Individual articles of his on specific topics such as the status of Formosa,<sup>2</sup> the equivalence of the cannon shot rule and the nautical league in the history of the territorial sea,<sup>3</sup> the history of the treaty ratification rule,<sup>4</sup> the condominium of the New Hebrides,<sup>5</sup> the status of archipelagos<sup>6</sup> or the English choice of law rule in shipboard torts<sup>7</sup> could be instanced (although in none of these areas was he involved in the same sort of continuing debate). Again, through the medium of his general treatise he touched on virtually all the major topics of international law, and in respect of most of them had something interesting and distinctive to say. For example, his treatment of the law of State responsibility with respect to State contracts, concessions and bonds is as good as anything on the subject:<sup>8</sup> obviously his struggles with the interrelations of municipal and international law in the context of State succession had borne fruit here, and it is a pity that he wrote nothing more detailed or definitive in this area.

It would be beyond the scope of this account to discuss such specific contributions in detail. However, it is appropriate to say something more about O'Connell's general attitudes, first, to the philosophy and, secondly, to the practice of international law.

<sup>1</sup> 'The Influence of Modern International Law on Naval and Civil Operations at Sea', *Naval Review* (United States Naval Institute Proceedings), 103 (1977), pp. 156-69 at p. 169. Cf. loc. cit. above (p. 65 n. 3), p. 134.

<sup>2</sup> 'The Status of Formosa and the Chinese Recognition Problem', *American Journal of International Law*, 50 (1956), pp. 405-16.

<sup>3</sup> 'The Equivalence of the Nautical League and the Cannon-shot in the Law of Nations', in *Festschrift für Friedrich Berber* (1973), pp. 367-75, where he argues that the three-mile limit was an independent development, not an extrapolation from the cannon-shot rule.

<sup>4</sup> 'A *cause célèbre* in the History of Treaty-making: the Refusal to Ratify the Peace Treaty of Regensburg in 1630', this *Year Book*, 42 (1967), pp. 71-90. On this episode see also his *Richelieu* (1968), pp. 212-21.

<sup>5</sup> 'The Condominium of the New Hebrides', this *Year Book*, 43 (1968-9), pp. 71-145. Here he argued that, despite difficulties, 'joint rule in the New Hebrides . . . has not proved unworkable in practice when the will to make it work has been present' (p. 71). His detailed description of the condominium regime, however, was capable of another interpretation!

<sup>6</sup> 'Mid-Ocean Archipelagos in International Law', this *Year Book*, 45 (1971), pp. 1-77.

<sup>7</sup> 'The English Choice of Law Rule in Collision Suits and Shipboard Torts', in *Recht über See. Festschrift für Rolf Stodter* (1979), pp. 101-7 (an interesting essay in the relation between international law and English conflict of laws).

<sup>8</sup> *International Law* (2nd edn., 1970), vol. 2, ch. 31 (misleadingly entitled 'State Responsibility: the Contract Situation').

## 5.1 O'CONNELL AND THE NATURE OF INTERNATIONAL LAW

A superficial reading of O'Connell's international legal *œuvre* since 1949 might give the impression at least of a marked change in attitude to the subject, if not in his convictions as to its nature and foundation. To some extent this is true: his very early work exhibited a rather absolutist view of the controlling influence of international law over municipal law, and over the autonomy of its subject-matter, which experience and reflection were to temper.<sup>1</sup> But after the late 1950s his attitudes and convictions on these fundamental questions seem to have been fairly stable. At the risk of some oversimplification they can be summarized as, first, a strong belief that the foundations of international law, as a normative discipline, are to be found in processes of juristic evaluation rather than in the crude ('anecdotal') description of State practice—a view which can, with some reservations, be described as a modified natural law position—but, on the other hand, a pessimism, sometimes like despair, at the present incoherence of the subject through the failure of its exponents to accept this fundamental role, or to agree on even the basic criteria for evaluation. Quite apart from the overwhelming weight of material (which he thought, with justification, threatened to splinter international law into a range of specialisms not even pretending to scientific autonomy), the subject thus suffered from a serious—in terms of its disciplinary aspirations, potentially fatal—dissensus.

A younger student might be tempted to dismiss O'Connell's undoubted pessimism on these topics as the product of maturing conservatism, but that would be facile. It is true that many of O'Connell's views were politically conservative, even against the rather restricted spectrum of the English and Australian societies in which he lived. But that conservatism (which seems if anything to have become less dogmatic as he grew older) was of a singularly temperamental rather than ideological variety. Whatever conclusions he drew from time to time from his philosophical premisses, those premisses were, in the political spectrum, very much open-textured.<sup>2</sup> Good examples of this were his attitudes to human rights and to the developing concept of *jus cogens*. His naturalistic philosophy of international law was fully capable of accommodating a genuine international law of human rights, and in certain areas such affirmative conclusions were drawn: for example, his rejection of the continuous nationality rule, based on a view of diplomatic protection as a machinery for protecting not State interests but individual rights.<sup>3</sup> Yet in the more obvious aspects of human rights he was more equivocal:

The movement of international law into the moral sphere of human rights began in the 1930s with modest arguments in favour of the view that the

<sup>1</sup> Cf. the differences between his views of non-treaty succession in 1956 and 1967: above, p. 26.

<sup>2</sup> That they were so is due in large measure to the Catholicity (in both senses) of their origins.

<sup>3</sup> Above, p. 20 n. 1.



individual has a place, albeit a confined one, in the structure of international law, which, to that extent, was not altogether a system of law between governments. The argument at that stage was very technical in character and limited in aim. Then, under the shock of the revelations in 1945 of the Nazi atrocities, and with the laudable intention of never again allowing governments to shelter behind the rampart of sovereignty when doing vicious things to their own people, we saw some elementary propositions about human rights incorporated in the United Nations Charter, and we had the Convention against Genocide and the Universal Declaration of Human Rights.

At that time it was not intended that the human rights provisions in the Charter should negate altogether the restrictions in the same Charter upon the United Nations interfering in the internal affairs of States, nor that the Universal Declaration should be more than a statement of aspirations. But progressively some of these aspirations have been upgraded psychologically and extended by a range of United Nations Covenants and the Convention on the Elimination of all Forms of Racial Discrimination.

The Human Rights Covenants are at once all-embracing and imprecise in their directions, so that they are powerful tools of political pressure.

...  
The notion of natural law was never intended to be an agent of incessant, undirected and perhaps deleterious social change, which is the way human rights and civil liberties are often projected today in both the national and international spheres. The capricious directions often taken by human rights is in fact the product of their humanistic origin in the United Nations.<sup>1</sup>

Similarly, the notion of *jus cogens* ought to have been, and at a theoretical level no doubt was, acceptable to him; but its implications in disruptive or unscrupulous hands were such that he resisted the elaboration of *jus cogens* outside the law of treaties.

Another possibly portentous development concerns the new doctrine of *jus cogens*. At the moment this has been interpolated only into treaty law, but it has the potentiality, when propelled by political expediency, to break out into the field of customary law generally. By a rule of *jus cogens* is meant a peremptory norm of international law, so fundamental that no two States may validly contract in contradiction of it.

This theory of *jus cogens* is a product of the 1960's, although it harks back to natural law, and the notion that there can be no valid positive law which contradicts the precepts of natural law. But, like so many other quasi-moral concepts which today abound on the fringes of the law, it has become an umbrella under which diverse and mutually inconsistent philosophies shelter...

So long as *jus cogens* is confined to treaty law, and can play no greater role than to exclude attempts by treaty-making to circumvent such provisions in the United Nations Charter as the outlawry of the use of force to achieve a territorial change, this kaleidoscope of philosophies underlying *jus cogens*

<sup>1</sup> 'The Law of Nature and the Law of Nations. Where does the Church Stand Today?', *Law and Justice*, No. 48/49 (1975), pp. 48-66 at pp. 61-2. Cf. the brief and unconvincing account of human rights in *International Law* (2nd edn., 1970), vol. 2, pp. 742-61.

does not matter much. But there are ominous indications that progressivists will seek to harness the doctrine to their chariots of legal revolution, and the resilient character of modern customary international law makes it all too easy for them to do this.

. . . [W]here does this device for bridging the philosophical gap between positive law and moral precept lead us? Over the span of history that lies ahead, what mischief is it capable of, given that the United Nations is now a troubled sea of emotions, whose tides surge back and forth with the gales of prejudice, intolerance, envy and spite so capriciously generated these days? The true moral order, which the Thomists used to call *ordo tranquillitatis*, (following St. Augustine's fundamental principle that *pax* is the *tranquillitas ordinis*) is as easily subverted by this ever changing focus of political whim as is the economic order subverted by Arab money surging from one haven to another.<sup>1</sup>

But *jus cogens*, if it means anything at all, must constitute a central aspect of the structure of international law, with consequences not only for the law of treaties. (Its content is, of course, another matter.) Such a structural development is harmonious with—almost entailed by—a naturalist conception of international law: clearly enough, O'Connell's concern was with the consequences rather than the concept.<sup>2</sup>

Despite his evident interest in them, O'Connell wrote comparatively little on the fundamental problems of the structure and philosophy of international law. For example, his textbook, surprisingly, contains no historical or theoretical introduction, and the treatment of the methodological problems, in the chapter on 'The Formation of International Law', is rather cursory.<sup>3</sup> The fullest account of the intellectual history of international law is to be found in an essay, 'Rationalism and Voluntarism in the Fathers of International Law', published in 1964;<sup>4</sup> from this, together with two later papers, it is possible to construct his views, at least in outline.

'Rationalism and Voluntarism . . .' is preoccupied with the problem of accounting for the natural law elements of international law without being led (as Pufendorf, and to some extent Grotius, had been led) to an unacceptable identification of the two. On any view, international law is made up of 'positive' or 'willed' elements, of contingent rules. If it is wholly so, it may be merely an adjunct of diplomacy, with consequent loss of disciplinary integrity and of the entitlement to be called 'law'.

<sup>1</sup> 'The Law of Nature and the Law of Nations', loc. cit. (previous note), pp. 59-60.

<sup>2</sup> To be fair, few writers have seen this rather obvious point. There is only a brief, and critical, comment on *jus cogens* (in the section on Treaties) in *International Law* (2nd edn., 1970), vol. 1, pp. 244-5. It is not mentioned in the first edition (1965).

<sup>3</sup> As one reviewer commented, ch. 1 of *International Law* is clearly the worst chapter in the treatise: D. W. Greig, *Modern Law Review*, 34 (1971), p. 704.

<sup>4</sup> *Indian Yearbook of International Affairs*, 13 (1964), pp. 3-32. For earlier versions of this paper see 'The Rational Foundations of International Law. Francesco Suarez and the Concept of Jus Gentium', *Sydney Law Review*, 2 (1957), pp. 253-70; 'Natural Law and the International Community', *Catholic Lawyer*, 5 (1959), pp. 207-17.

O'Connell found a resolution of this problem, at least in general terms, in the work of Suarez, 'probably one of the major contributions of legal philosophy'.<sup>1</sup> For Suarez accounted for the law of nations

. . . as deriving from the common consensus of sovereigns acting as organs of the peoples who, by use and custom, introduce law. *Jus gentium* now is not natural but human, positive law founded on a concordance of wills manifested in a conjunction of usages, and differing from civil law (municipal law) only in the subjects to which it addresses itself . . . It is true that many of the institutions traditionally described as of the *jus gentium*, such as the proposition *pacta sunt servanda*, follow upon natural law, but they do so only in conjunction with the assumption of the existence of human society and circumstances peculiar to it. For instance, *pacta sunt servanda* presupposes the existence of commercial intercourse and the actual making of a promise, both social acts: The concept of theft presupposes that society has organized itself on a basis of *divisio rerum* and not community of property. The inference, therefore, from the natural law to the propositions of *jus gentium* is dependent upon the intervention of human free will and of moral expediency, and is not a matter of logical necessity. And since immutability derives from objective necessity it follows that the *jus gentium* is not immutable. Nor is it necessarily common to all, as is natural law . . .

*Jus gentium* now occupies a position intermediate between natural law and positive law in general. How is it transformed into international law? Suarez says that *jus gentium* has a twofold form: it is a body of laws which individual States observe within their own borders but which are similar and commonly accepted; it is also the law which various nations ought to observe in their relations with each other. There is no inherent ambiguity in this equivocal use of the term . . . because at this fundamental stage the basic concepts of international and municipal law must be the same.

. . . The institutions of *jus gentium* whether they be of international or municipal law are to this extent anchored to the natural law . . . [T]he source of obligation, of a law created by a concordance of wills of sovereigns is thus clear. The positivists were later to confront themselves with the questions, why should not the withdrawal of consensus dispel obligation; why, if the law of nations is the consensus of 'nearly all' nations should the non-consenting or the recalcitrant be obliged? Suarez's answer to these questions depends on his conception of the international community and the role of natural law in sanctioning the *jus gentium*. Just as man is social, so is he juridical. Custom derives its juridical character from the juridical order predicated on human nature. Although men are divided into various nations they preserve the same moral and quasi-political unity, so that though perfect in themselves States are also members of the human race and dependent to a great degree upon each other.

Natural law is thus the integrating factor in the international community.<sup>2</sup>

On the other hand, with Grotius 'the precarious balance between reason and will which Suarez had achieved was disturbed'.

<sup>1</sup> *Indian Yearbook of International Affairs*, 13 (1964), p. 12.

<sup>2</sup> *Ibid.*, pp. 13-16.



Yet at the same time virtually the whole of the *De Jure Belli ac Pacis* consists of a great and fruitful construction of legal institutions, arrived at by a process of reasoning only, in many instances said to be of the natural law, and having a positive law aspect only inasmuch as a collection of incidents is assembled in support of the proposition. Far from illustrating an exercise of will bringing into being law which was not previously in existence, these incidents are resorted to only in virtue of a *posteriori* technique of establishing the natural law, which Grotius had argued was an alternative to the *a priori* method. He is merely assembling authorities to demonstrate the uniformity of conclusions brought about by 'right reasoning'. The institutions to which Grotius refers, and which he describes as 'natural law', are those which Suarez would have distinguished as pertaining to the *jus gentium*, and hence contrived by human will, though informed by reason.<sup>1</sup>

The ontological weakness in Grotius is carried further by Pufendorf:

The incongruity of locating law in the realm of will while exaggerating the capacity of reason, which dominates Pufendorf's work, is already present in Grotius, and it arises from the theory of sociability. Man was said to have the capacity or potency to escape from the isolation of the state of nature. Thus he was no longer conceived as a feature in an objective order of relationship which experience discloses to us, but as an individual in a contingent scheme of his own devising, which has moral character only in that God has willed that man should so act. . . . Positive law to Pufendorf is what proceeds entirely from the pleasure of the legislator. It has no agreement with human nature, it is not necessary to preserve it, and it is not constructed rationally, although it should have utility value. It shares with natural law the fundamental quality of being 'willed', the authority in the one case being human and in the other divine. The important outcome of this distinction was the denial that the law of nations was positive law, since no human superior had willed it. Rather it is natural law extended by rational unfolding. Hence the distinction between natural law and international law, which Suarez had struggled to bring into sharp focus, and which Grotius had tended to blur, was now altogether dissolved.<sup>2</sup>

But for O'Connell, as for Suarez, international law is located in, indeed constituted by, the delicate balance of juristic reflection and assessment of the positive materials of State practice. Consensual or positivist theories fail because they do not allow for the former element. O'Connell gives it primacy.

It is clear . . . that the 'practice' of States is largely, except perhaps in a negative sense, an illusion, and the attempt to found a legal system on what States do and have agreed to is to a great extent profitless. For one thing, until the historians have thoroughly worked over the materials of practice, and until the geography of the practice is sufficiently extended, the implications of particular acts, asseverations and protestations of States are questionable. If customary international law were really limited to what the bulk of States have assented to there would be precious little of it. In fact, most international law is to be found in writings and in decisions of tribunals, and it is the cogency of the juristic or judicial reasoning, and not the agreement of State officers, that compels intellectual assent. It is

<sup>1</sup> *Indian Yearbook of International Affairs*, 13 (1964), p. 20.

<sup>2</sup> *Ibid.*, pp. 25-6.

indisputable that rules of the territorial sea, just as rules of the road in municipal law, depend upon a decisive exercise of will of human authority, for this is an area in which elaboration of principles discoverable in nature cannot be carried far. But it must be equally indisputable that the rules of denial of justice, of succession to rights and obligations, of the processes of arbitration, depend far less on description of what States do than on analysis of juristic problems. The reader who tracks through the intricate reasoning of many arbitral decisions, and finds himself compelled to defer to the arguments of acute judicial minds, finds himself less and less impressed by the view that international law is a law agreed to by States.

The conclusion is clear and inescapable, that international law is not, as the 17th Century writers would have put it, a matter of will, even if it is not entirely a matter of pure reason. The point of commencement is the assertion that the international community, like any community, requires the governance of principle. Whether we regard principle as dictated to us by philosophy, or merely as an accepted premise to a legal system, it may be referred to as a principle of justice. Some of the fathers of international law may have misled us into believing that these processes are syllogistic, and that the conclusions alleged to be propositions of international law are logical. Legal reasoning is not, however, logical reasoning, since it consists in the selection of the relevant principle, rather than in the form of the conclusion deduced therefrom. Our accepted canons of justice dictate this selection, and it is accordingly in reference to them that the selection is evaluated. The fathers of international law were struggling to understand this problem in the context of a psychological debate which had the most profound implications for the metaphysics of human conduct, and if we find their struggles difficult to comprehend it is only because we have succeeded in disengaging law more completely than they did from ethics and theology. But in so doing we may well have deprived ourselves of the really effective condition for human subjection to law.<sup>1</sup>

One obvious problem is with the assumption that the 'accepted canons of justice' are in fact shared or acknowledged by those engaged in the process of evaluation. At least, the common inherent or entailed values are not acknowledged in common: hence the present crisis in the subject . . .

[B]ecause international lawyers are in disagreement on questions of value, and are unclear as to the criterion for isolating their subject from other areas of study, the subject is in disarray; and it is in disarray because the conflict of ideas in philosophy, carried over into jurisprudence, has not been resolved. . . . [W]hile the legislative process grows daily in volume and complexity, the jurist finds himself less intellectually equipped than he has ever been for the task of creating a regime of international justice. Much of his activity is pragmatic in character and technical in detail, and the discipline of international law in the wider sense is increasingly being deprived of the philosophical underpinning which will enable it to act as a solvent of those international problems—and they are the great problems—which escape from and defy the legislative technique. Deprived of the concept of order in its philosophical or value sense, the jurist finds the struggle to systematize the complex and incongruous world society ever more frustrating and

<sup>1</sup> Ibid., pp. 31-2.

exhausting . . . [T]he very integrity of the subject is at issue for want of any consensus of views as to its theoretical basis.<sup>1</sup>

Compared with the situation before 1914, international law today is intellectually anarchic. It is, of course, not the only intellectual activity to suffer from the incoherence of the contemporary world, but in its case the disability is compounded by the lack of theory to render congruous what is, in so many respects, factually incongruous. 'State practice' is today the practice of a large number of states, many of them immature, and impatient, and many of them arrayed in power blocs in a way that threatens the stability of traditional legal institutions. And the 'practice' derives sometimes from political decisions in which the legal factor has played no role at all, or has been discounted, and, sometimes from legal advice that is unsound, based on defective analysis of the problem, on resort to the wrong books or to books that are out of date, and frequently given under pressure and in too brief a form. Such 'practice' may be valueless as a precedent. What value, then, lies in the collection of records of attitudes struck by states from time to time, or of actions taken by them? Unless the precedents can be evaluated and compared critically the investigation cannot be raised above the anecdotal level; yet, it is precisely with respect to the canons of evaluation and criticism that contemporary international legal scholarship is barren. Evaluation implies judgment and judgment implies reason, not choice or will. If international law is to possess autonomy, therefore, its rational and speculative character must be conceded, but the imperative theory of law, and the whole philosophical environment of the sovereign state, denies it this character. Here is the central problem of international law . . .<sup>2</sup>

Ten years later his diagnosis was much the same.

The really fundamental shift that has occurred with respect to custom in the past decade or so has striking moral significance. The traditional doctrine has been that Governments are presumed to act consistently with the law, so that it is the *opinio juris*, or common juristic conscience, that elevates State practice above the level of mere anecdote and endows it with legal quality. But today it is manifestly untrue to say that Governments so intend. On the contrary, more often than not they deliberately break the traditional rubrics simply in order to force a change in the law by pressure. Although the International Court continues to pay lip-service to *opinio juris*, in fact no element of this is ordinarily discernible in a great deal of the contemporary legal process.

The result is that we must face the fact that traditional methodology rooted in Natural Law concepts is no longer practically available to us. Instead we have a doctrine that seeks to enlarge upon fact. It is said that if States can make their unilateral claims effective, the result will be a new rule of customary law. This doctrine of effectiveness operates in conjunction with a revised Vattellian notion of consent *via* the concept of acquiescence or absence of protest. If States can make a 200 mile claim effective, then the law is changed, even if the change is brought about by violation of the old law. The problem is that effectiveness itself is not a fact, and it is as difficult as ever to perceive how facts, especially when they are the products of might, rather than of

<sup>1</sup> 'The Role of International Law', *Proceedings of the American Academy of Arts and Sciences*, 95 (1966), pp. 627-43 at pp. 628-30.

<sup>2</sup> *Ibid.*, pp. 634-5.



right, can gain normative content. We are now perilously near the point where law dissolves into diplomacy.<sup>1</sup>

## 5.2 THE PRACTICE OF INTERNATIONAL LAW

Inevitably, these views carried over into his treatment of the modern practice of international law. His views of the paramount role of juristic assessment and evaluation entailed a general disapproval of efforts at codification, which tend to freeze the law at a particular stage of development. Not merely was he critical of particular aspects of codification conventions such as the Treaty Succession Convention: he tended to disapprove *in principle* of the codification process. He was fond of citing Savigny's well-known critique of the German codification movement.<sup>2</sup> Codification could 'only arrest the historical development of the law and encapsulate it within a particular time-frame and a particular ideological milieu'.<sup>3</sup> He made much the same criticism of the 1958 Geneva Conventions on the Law of the Sea,<sup>4</sup> and of the State Immunity Act 1978 (U.K.), which prevented English courts from independently developing the common law of immunity in alignment with international law.<sup>5</sup> Correspondingly, his treatment of the work of the International Law Commission, when it was not critical, tended to be rather descriptive: in his textbook the Commission is cited or discussed only sparsely and selectively. A report to which he contributed, in 1978, asserted that the Commission's 'influence generally seems to be diminishing'.<sup>6</sup>

Rather similar criticism was levelled at the law-making activities of United Nations conferences and the General Assembly: in particular he was critical of the Law of the Sea Conference, especially in its early stages. He thought the proposals for internationalization of the deep sea bed the product of 'international hysteria'<sup>7</sup> and the Conference itself a 'degradation of diplomatic method'.<sup>8</sup> Nor did the International Court escape.<sup>9</sup>

It would be wrong to overemphasize the negative and pessimistic impression these comments might give. The gap O'Connell perceived between the growing areas of detailed positive law and the central

<sup>1</sup> Loc. cit. above (p. 75 n. 1), pp. 58-9.

<sup>2</sup> *Of the Vocation of our Age for Legislation and Jurisprudence* (2nd edn., trans. Hayward, 1832); cited in *Recueil des cours*, 130 (1970-II), at pp. 199-200.

<sup>3</sup> Loc. cit. above (p. 41 n. 4), p. 739.

<sup>4</sup> e.g. 'Legal Problems of the Exploitation of the Ocean Floor', *Impact of Science on Society*, 21 (1971), pp. 253-64.

<sup>5</sup> [Comment on State Immunity], in International Law Association, *State Immunity: Law and Practice in the United States and Europe. Proceedings of Conference held on November 17, 1978*, pp. 12-16 at p. 13.

<sup>6</sup> International Law Association, Manila Conference, *Report of the First Meeting on the Theory and Methodology of International Law* (1978), p. 11.

<sup>7</sup> 'Complex Ocean and Seabed Issues', in Cameron (ed.), *Private Investments and International Transactions in Asian and South Pacific Countries* (1975), pp. 695-704 at p. 695.

<sup>8</sup> 'The Law of the Sea', *Journal of the Royal Society of Arts*, 124 (1976), pp. 367-75 at p. 374.

<sup>9</sup> Loc. cit. above (p. 80 n. 1), pp. 57-8; cf. loc. cit. above (n. 6), p. 13.

philosophic or evaluative problem is paralleled in his own work. His discussions of particular questions were thorough and forthright. If they were also, sometimes, inconclusive, this was only because, in his view, that accurately reflected the 'state of play' (even on questions of great interest and concern to him, such as innocent passage of warships). But 'State practice is not a matter of counting heads but of juristic evaluation of the factors that tend to legitimize action by individual States',<sup>1</sup> and where the various factors pointed to a conclusion he was direct and clear in adopting it. A good example is his conclusion on archipelagos:

The only progressive approach . . . is to seek to integrate the archipelagic principle in existing international law in such a way as to accommodate the interests of the archipelagic State without disproportionately affecting the interests of other States and of the world at large.<sup>2</sup>

Written as early as 1969, this illustrates very well his willingness to accept novel and potentially disturbing developments provided they could be squared with principle. His work on State succession provides similar examples, as we have seen.

A further attribute was his remarkable ability for grasping the essential issues in any problem, and thus for setting the terms on which debate would proceed.

More fundamentally, there is in his work an increasing tendency towards emphasizing basic principle: the prohibition of the use of aggressive force in international relations except in self-defence (in his work on naval power); the interaction of international and municipal law (a subject of increasing interest to him, and one which he thought had become 'one of the main issues of legal action'<sup>3</sup>) and, generally, the basic sources and methods of international law.<sup>4</sup> It seems very likely that he would have come to concentrate more on questions like these, contributing to the resolution of the fundamental problems which he had diagnosed with such clarity and vigour. That was not to be, and the result is that his ultimate contribution to the discipline of international law will be seen as more specific and specialized than it could, or should, have been.

But the diagnosis remains. On any view, international law faces crises, of internal coherence in the face of an overwhelming bulk of material, of communication with decision-makers and with other relevant disciplines; ultimately, perhaps, of confidence. Of course, painstaking and rigorous work on particular topics is still required, but so too is unprejudiced analysis of basic theoretical questions. What O'Connell might have

<sup>1</sup> 'Mid-Ocean Archipelagos in International Law', this *Year Book*, 45 (1971), pp. 1-77 at p. 63.

<sup>2</sup> *Ibid.*, p. 75.

<sup>3</sup> 'Trends in the Law of the Sea', in *Proceedings and Papers of the Fifth Commonwealth Law Conference* (1977), pp. 415-23 at p. 423.

<sup>4</sup> He convened an I.L.A. Study Group (the Report of which is cited above, p. 81 n. 6). It must be said that the Report is rather diffuse and unpromising (but see the annexed paper by J. M. Finnis: *ibid.*, pp. 14-21).

contributed to the latter, as he had already done in so marked and notable a way to the former, is one measure of our loss.

## A BIBLIOGRAPHY OF THE PRINTED WORK OF D. P. O'CONNELL

Note: Items are listed chronologically by year, and alphabetically within years. Book reviews and newspaper articles are excluded.

### I. BOOKS (9)

*The Law of State Succession* (Cambridge Studies in International and Comparative Law No. 5, Cambridge U.P., 1956: pp. i-xl, 1-425).

*International Law* (London, Stevens & Sons, 1965, 2 vols.: Vol. I, pp. i-xxvi, 1-651; Vol. II, pp. i-xxiv, 653-1434; and Index, pp. 1-40).

(Edited), *International Law in Australia* (London, Stevens & Sons, 1965: pp. i-xliv, 1-603).

*State Succession in Municipal Law and International Law* (Cambridge Studies in International and Comparative Law No. 7, Cambridge U.P., 1967, 2 vols.: Vol. I: *Internal Relations*, pp. i-cxii, 1-592; Vol. II: *International Relations*, pp. i-cxii, 1-430).

*Richelieu* (Weidenfeld & Nicolson, London, 1968: pp. i-vi, 1-509). Translated into German as: *Richelieu, Kardinal-Staatsmaan-Revolutionar* (Wilhelm Heyne Verlag, Munich, 1978: pp. 1-496).

*International Law* (2nd edn., London, Stevens & Sons, 1970, 2 vols.: Vol. I, pp. i-xxxii, 1-595; Vol. II, pp. i-xxiv, 597-1309; and Index, pp. 1-35).

*International Law for Students* (London, Stevens & Sons, 1971: pp. i-xviii, 1-445).

(Edited with A. Riordan), *Opinions on Imperial Constitutional Law* (Sydney, Law Book Co., 1971: pp. i-xx, 1-436).

*The Influence of Law on Sea Power* (Manchester, Manchester U.P., 1975: pp. i-xviii, 1-204).

### II. ARTICLES AND NOTES (109)

'A Catholic View of the Nuremberg Trials', *Catholic Review* (N.Z.), 4 (1948), pp. 343-63.

'The British Commonwealth and State Succession after the Second World War', this *Year Book*, 26 (1949), pp. 454-63.

'The Greek Contribution to Religion', *Catholic Review* (N.Z.), 5 (1949), pp. 119-32.

'The Search for Ideals in Law', *Catholic Review* (N.Z.), 5 (1949), pp. 228-43.

'Economic Concessions in the Law of State Succession', this *Year Book*, 27 (1950), pp. 93-124.

'The Legal Character of the Korean War', *New Zealand Law Journal*, 27 (1951), pp. 362-4.

'Secured and Unsecured Debts in the Law of State Succession', this *Year Book*, 28 (1951), pp. 204-19.

'Change of Sovereignty and the Doctrine of Act of State', *Australian Law Journal*, 26 (1952), pp. 201-5.

'Legal Aspects of the Peace Treaty with Japan', this *Year Book*, 29 (1952), pp. 423-35.

'Legal Issues in the Persian Oil Dispute', *New Zealand Law Journal*, 28 (1952), pp. 57-9.

'Reconsideration of the Doctrine of International Servitude', *Canadian Bar Review*, 30 (1952), pp. 807-18.



- 'Domestic Relations in Soviet Law', *The Month (N.S.)*, 10 (1953), pp. 261-70.
- 'Pre-War Commercial Transactions with Germany and Japan', *Australian Law Journal*, 27 (1953), pp. 504-11.
- 'The Value as Evidence of a Certificate of Birth, Death or Marriage', *Australian Conveyancer and Solicitor's Journal*, 6 (1953), pp. 69-74.
- 'L'Australie et sa plate-forme sous marine', *Revue de droit international, de sciences diplomatiques et politiques*, 32 (1954), pp. 63-6.
- 'Authority of a Solicitor to Acknowledge a Debt on Behalf of his Client', *Australian Conveyancer and Solicitor's Journal*, 7 (1954), pp. 112-14.
- 'Ideology and International Law', *Twentieth Century* (Melbourne), 9 (1954), pp. 40-50.
- 'Nationality in "C" Class Mandates', this *Year Book*, 31 (1954), pp. 458-61.
- 'Policy in the Far East: the Moral Implications of Co-existence', *The Month (N.S.)*, 12 (1954), pp. 325-33.
- 'Recognition of Foreign Adoption Orders', *Australian Conveyancer and Solicitor's Journal*, 7 (1954), pp. 85-90.
- '*Res ipsa loquitur*: the Australasian Experience', *Cambridge Law Journal*, 12 (1954), pp. 118-32.
- 'Rival Claims of Parents in Custody Suits', *University of Queensland Law Journal*, 2 (1954), pp. 187-205.
- 'Solicitor's Privilege with Respect to Client's Documents', *Australian Conveyancer and Solicitor's Journal*, 7 (1954), pp. 48-54.
- 'Boundary Trees', *Australian Conveyancer and Solicitor's Journal*, 8 (1955), pp. 106-10.
- 'The British Commonwealth Today: the Imperial Idea', *Twentieth Century* (Melbourne), 10 (1955), pp. 48-57.
- 'Carriers: the Law of Common Carriage in New Zealand', *New Zealand Law Journal*, 31 (1955), pp. 26-8, 106-7, 136-40.
- 'Common Interest in the Maintenance of Actions', *Australian Conveyancer and Solicitor's Journal*, 8 (1955), pp. 41-3.
- 'A Critique of the Iranian Oil Litigation', *International and Comparative Law Quarterly*, 4 (1955), pp. 267-93.
- 'International Law in the Cold War', *The Month (N.S.)*, 13 (1955), pp. 201-11 (also in *Australian Outlook*, 9 (1955), pp. 119-24).
- 'Recognition and Effects of Foreign Adoption Orders', *Canadian Bar Review*, 33 (1955), pp. 635-53.
- 'Sedentary Fisheries and the Australian Continental Shelf', *American Journal of International Law*, 49 (1955), pp. 185-204.
- 'What Cambridge is Talking About', *Twentieth Century* (Melbourne), 10 (1955), pp. 119-24.
- 'Agreements—Whether Determinable by Reasonable Notice or Only by Mutual Consent', *Australian Conveyancer and Solicitor's Journal*, 9 (1956), pp. 61-3.
- 'Ante-nuptial Agreements in Custody Suits', *The Month (N.S.)*, 15 (1956), pp. 26-31.
- 'The Status of Formosa and the Chinese Recognition Problem', *American Journal of International Law*, 50 (1956), pp. 405-16.
- 'Unjust Enrichment', *American Journal of Comparative Law*, 5 (1956), pp. 2-17.
- 'What Oxford is Talking About', *Twentieth Century* (Melbourne), 10 (1956), pp. 197-200.
- 'The Crown in the British Commonwealth', *International and Comparative Law Quarterly*, 6 (1957), pp. 103-25.
- 'The Double-think in the U.N.', *The Month (N.S.)*, 17 (1957), pp. 235-46.

- 'The Rational Foundations of International Law, Francesco Suarez and the Concept of Jus Gentium', *Sydney Law Review*, 2 (1957), pp. 253-70.
- 'Claims to Antarctica', *Modern Age*, 2 (1958), pp. 186-94.
- 'Fischer von Ehrlach', *The Month (N.S.)*, 20 (1958), pp. 38-42.
- 'Fr. Rupert Meyer', *The Month (N.S.)*, 20 (1958), pp. 232-5.
- 'The Geneva Conference on the Law of the Sea: Possible Implications for Australia', *Australian Law Journal*, 32 (1958), pp. 134-7.
- 'The New Class—a Retrospect', *Twentieth Century* (Melbourne), 13 (1958), pp. 160-4.
- 'Problems of Australian Coastal Jurisdiction', this *Year Book*, 34 (1958), pp. 199-259.
- 'The Doctrine of Colonial Extra-territorial Legislative Incompetence', *Law Quarterly Review*, 75 (1959), pp. 318-32.
- 'Domestic Relations in Soviet Law', *Catholic Law*, 5 (1959), pp. 277-83.
- 'Natural Law and the International Community', *Catholic Lawyer*, 5 (1959), pp. 207-17.
- 'International Law and Boundary Disputes', *American Society of International Law, Proceedings*, 54 (1960), pp. 77-84.
- 'The Relationship between International Law and Municipal Law', *Georgetown Law Journal*, 48 (1960), pp. 431-85.
- 'Human Rights and the State', *The Month (N.S.)*, 27 (1962), pp. 101-8.
- 'Independence and Succession to Treaties', this *Year Book*, 38 (1962), pp. 84-180.
- 'The Nature of British Military Law', *Military Law Review*, 19 (1963), pp. 141-55.
- 'La Personnalité en droit international', *Revue générale de droit international public*, 67 (1963), pp. 1-39.
- 'State Succession and the Effect upon Treaties of Entry into a Composite Relationship', this *Year Book*, 39 (1963), pp. 54-132.
- 'Rationalism and Voluntarism in the Fathers of International Law', *Indian Yearbook of International Affairs*, 13 (1964), pp. 3-32.
- 'State Succession and Problems of Treaty Interpretation', *American Journal of International Law*, 58 (1964), pp. 41-61.
- 'State Succession to Treaties in the Commonwealth: a Reply', *International and Comparative Law Quarterly*, 13 (1964), pp. 1450-3.
- 'Australian Coastal Jurisdiction', in *International Law in Australia* (1965), pp. 246-91.
- 'The Evolution of Australia's International Personality', in *International Law in Australia* (1965), pp. 1-34.
- 'Independence and Problems of State Succession', in W. V. O'Brien (ed.), *The New Nations in International Law and Diplomacy* (Yearbook of World Polity, vol. 3, Praeger, N.Y., 1965), pp. 7-41.
- 'New Zealand and the Law of State Succession', in J. F. Northey (ed.), *The A. G. Davis Essays in Law* (Butterworths, London, 1965), pp. 180-94.
- 'The Role of International Law', in Symposium, 'Conditions of World Order', *Daedalus. Proceedings of the American Academy of Arts and Sciences*, 95 (1966), pp. 627-43, and S. Hoffmann (ed.), *Conditions of World Order* (Houghton Mifflin, Boston, 1968), pp. 49-65.
- 'A cause célèbre in the History of Treaty-making: the Refusal to Ratify the Peace Treaty of Regensburg in 1630', this *Year Book*, 42 (1967), pp. 71-90.
- 'Problems of Australian Coastal Jurisdiction', *Australian Law Journal*, 42 (1968), pp. 39-51.
- 'Territorial Claims in the Grotian Period', in C. H. Alexandrowicz (ed.), *Grotian Society Papers 1968. Studies in the History of the Law of Nations* (M. Nijhoff, The Hague, 1970), pp. 1-15.
- 'The Condominium of the New Hebrides', this *Year Book*, 43 (1968-9), pp. 71-145.

- [Comment on 'Sovereignty and Jurisdiction over Australian Coastal Waters'], *Australian Law Journal*, 43 (1969), pp. 441-4.
- 'The Legal Aspects of Drilling in the Deep Sea', *Australian Petroleum Exploration Association Journal*, 9 (1969), pp. 31-7.
- 'The Australian Maritime Domain', *Australian Law Journal*, 44 (1970), pp. 192-208.
- 'The Commonwealth Fisheries Power and *Bonser v. La Macchia*', *Adelaide Law Review*, 3 (1970), pp. 500-7.
- 'The Federal Problem Concerning the Maritime Domain in Commonwealth Countries', *Journal of Maritime Law and Commerce*, 1 (1970), pp. 389-413.
- 'International Law and Contemporary Naval Operations', this *Year Book*, 44 (1970), pp. 19-85.
- 'Marine Resources and the Law', *Reports of the Australian Academy of Science*, No. 12 (May 1970), pp. 51-63.
- 'Recent Problems of State Succession in relation to New States', *Recueil des cours*, 130 (1970-II), pp. 93-206.
- 'The Juridical Nature of the Territorial Sea', this *Year Book*, 45 (1971), pp. 303-83.
- 'Legal Problems of the Exploitation of the Ocean Floor', *Impact of Science on Society*, 21 (1971), pp. 253-64.
- 'Mid-Ocean Archipelagos in International Law', this *Year Book*, 45 (1971), pp. 1-77.
- 'The Quality of (South) Australian Education. The Level of International Understanding', *Quadrant*, 15 (1971), pp. 32-5.
- 'Revolution in the New Left International Law', *Quadrant*, 15 (1971), pp. 37-41.
- 'The Legal Control of the Sea. Preparations for the 1973 Conference', *The Round Table*, No. 248 (October 1972), pp. 411-23.
- 'The Legality of Naval Cruise Missiles', *American Journal of International Law*, 66 (1972), pp. 785-94.
- 'State Succession and the Theory of the State', in C. H. Alexandrowicz (ed.), *Grotian Society Papers 1972. Studies in the History of the Law of Nations* (M. Nijhoff, The Hague, 1972), pp. 23-75.
- 'The Equivalence of the Nautical League and the Cannon-Shot in the Law of Nations', in *Festschrift für Friedrich Berber* (C. H. Beck, Munich, 1973), pp. 367-75.
- 'German Literature on the Territorial Sea 18th and 19th Centuries', in *Multitudo Legum Ius Unum. Festschrift für Wilhelm Wengler* (Interrecht, Berlin, 1973), pp. 325-35.
- 'Naval Policy and International Law and International Relations', in *Britain and the Sea. The Collected Papers and Records of the Conference held at the Royal Naval College Greenwich, 12-14 September 1973*, pp. 24-34.
- 'Die Rechtsordnung der Meereszonen im Verhältnis von Bund und Gliedstaaten in Australien', *Jahrbuch für internationales Recht*, 16 (1973), pp. 209-28.
- 'The Present State of the Law on State Succession', in M. Bos (ed.), *The Present State of International Law and other Essays* (Kluwer, Deventer, 1973), pp. 331-8.
- 'Adumbrations of the Continental Shelf Doctrine', in *La Communauté Internationale. Mélanges offerts à Charles Rousseau* (Pedone, Paris, 1974), pp. 173-85.
- 'The Law of the Sea Conference. Implications for Australia and New Zealand', *Bank of New South Wales Review*, No. 10 (1974), pp. 11-15.
- 'Richelieu, Cardinal de', in *Encyclopaedia Britannica (Macropaedia)* (15th edn., 1974), vol. 15, pp. 830-4.
- 'Complex Ocean and Seabed Issues', in V. S. Cameron (ed.), *Private Investments and International Transactions in Asian and South Pacific Countries* (N.Y., 1975), pp. 695-704.



'The Law of Nature and The Law of Nations' [The Second Richard O'Sullivan Memorial Lecture], *Law and Justice*, No. 48/49 (1975), pp. 48-66.

'The Dissolution of the Australian Parliament: 11 November 1975', *The Parliamentarian*, 57 (1976), pp. 1-14.

'The Law of the Sea' [The Thomas Gray Memorial Lecture], *Journal of the Royal Society of Arts*, 124 (1976), pp. 367-75 (reprinted in *Atlantic Community Quarterly*, 15 (1977), pp. 97-109).

'A cause célèbre in the Law of Maritime Neutrality: Hague Convention No. XIII', in *Um Recht und Freiheit. Festschrift für Friedrich August Freiherr von der Heydte* (Duncker & Humblot, Berlin, 1977), pp. 437-47.

'The Influence of Modern International Law on Naval and Civil Operations at Sea', *Naval Review* (United States Naval Institute Proceedings), 103 (1977), pp. 156-69.

'Innocent Passage of Warships', in *Thesaurus Acroasium*, VII (1977): *The Law of the Sea* (Thessaloniki, 1977), pp. 405-51.

'Monarchy or Republic?', in G. Dutton (ed.), *Republican Australia?* (Sun Books, Melbourne, 1977), pp. 23-43.

'Resource Exploitation, the Law of the Sea and Security Implications', in C. Bertram and J. J. Holst (eds.), *New Strategic Factors in the North Atlantic* (I.P.C. Science and Technology Press, Guildford, 1977), pp. 160-8.

'Trends in the Law of the Sea', in *Proceedings and Papers of the Fifth Commonwealth Law Conference* (Edinburgh, 1977), pp. 415-23.

[Comment on 'State Immunity'], in International Law Association, *State Immunity: Law and Practice in the United States and Europe, Proceedings of Conference held on November 17, 1978*, pp. 12-16.

'Bays, Historic Waters and the Implications of *A. Raptis & Son v. South Australia*', *Australian Law Journal*, 52 (1978), pp. 64-71.

'Transit Rights and Maritime Strategy', *Royal United Services Institute Journal* (London), June 1978, pp. 11-18.

'Canada, Australia, Constitutional Reform and the Crown', *The Parliamentarian*, 60 (1979), pp. 5-13.

'The English Choice of Law Rule in Collision Suits and Shipboard Torts', in *Recht über See. Festschrift für Rolf Stödter* (R. v. Decker's Verlag, G. Schenck G.m.b.H., Hamburg, 1979), pp. 101-7.

'Limited War at Sea since 1945', in M. Howard (ed.), *Restraints on War. Studies in the Limitation of Armed Conflict* (Oxford, 1979), pp. 123-34.

'Reflections on the State Succession Convention', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 39 (1979), pp. 725-39.



# THE PROBLEM OF THE 'NON-APPEARING' DEFENDANT GOVERNMENT\*

By SIR GERALD FITZMAURICE<sup>1</sup>

## I. THE PROBLEM

THIS article is concerned with the problem which, as a matter of convenience, can be called that of the 'non-appearing' defendant (or respondent) State or Government, and although this description is not entirely a happy one, it will serve for the time being.<sup>2</sup> There have to date been five cases of this kind before the International Court of Justice.<sup>3</sup> My own personal interest in the matter originally arose from the fact that I was still a Judge of the International Court on the occasion on which the technique of non-appearance was *first* utilized—namely by Iceland in 1972, and subsequently, in the *Icelandic Fisheries* cases (*United Kingdom and West Germany v. Iceland*).<sup>4</sup> In my separate opinion in the jurisdictional phase of those cases<sup>5</sup> (after which I had ceased to be a member of the Court) I had fairly strongly, though with restraint, deplored the process, and appealed to Iceland to discontinue it for the remaining stages of the proceedings.<sup>6</sup>

It must be stressed that in all these cases there existed one or more instruments under which the impugned State had antecedently accepted—or had apparently or *prima facie* accepted—the jurisdiction of the Court; and States in this position had of course frequently nevertheless denied that the Court had jurisdiction in relation to the circumstances of a particular case. But in order to do this they had always (even in the *Corfu* case—*United Kingdom v. Albania*) conformed to the procedure provided for that purpose by the Statute of the Court (to which they would *ex*

\* © Sir Gerald Fitzmaurice, 1981. This article went to print before the author had seen Sir Ian Sinclair's article in the *International and Comparative Law Quarterly* (reproducing his Francis Mann lecture of October 1980) largely on the same subject,—but while the approach is on somewhat different lines, the general thrust of the two articles is the same.

<sup>1</sup> Judge of the European Court of Human Rights; formerly a Judge of the International Court of Justice.

<sup>2</sup> The irony is that the 'non-appearing' State concerned *does* indirectly *defend* its case and 'respond' to the allegations made against it, but does so by means of a variety of unorthodox 'backstairs' or side-wind methods which avoid entering a formal 'appearance' in the case or presenting the customary written memorials and, eventually, oral arguments, to the Court. In this sense there is a kind of *de facto* appearance. But it is not technically 'an appearance in the case'—no set step in the proceedings is taken—and the State is thus able to contend that whatever unofficial communications it may have made to the Court, it is not *de jure* a party to the litigation and cannot be bound by the outcome. In the *Prisoners of War* case (*Pakistan v. India*)—to be returned to later herein—the Court described the situation as follows: 'Whereas the Government of India, while it has addressed certain communications to the Court through its Ambassador in The Hague, has not yet taken any step in the proceedings ...' (Order of 15 December 1973 removing the case from the Court's list).

<sup>3</sup> *Fisheries Jurisdiction* cases; *Nuclear Tests* cases; case concerning *Trial of Pakistani Prisoners of War*; *Aegean Sea Continental Shelf* case; and case concerning *United States Diplomatic and Consular Staff in Tehran* or *Hostages* case. For references, see the notes to pp. 107–11 below.

<sup>4</sup> *I.C.J. Reports*, 1972, pp. 12 and 181; *ibid.*, 1973, p. 49; and *ibid.*, 1974, p. 3 (these references are to the reports dealing with the United Kingdom aspects; those for West Germany are *pari passu*).

<sup>5</sup> *Ibid.*, 1973, at p. 79, paragraphs 21 and 22.

<sup>6</sup> *Ibid.*



*hypothesi* be parties, as Iceland was, otherwise *cadit quaestio*)—namely, by entering an appearance in the proceedings, appointing an agent in the case, and then filing a preliminary objection to the Court's jurisdiction which would in due course be argued before, and eventually decided by, the Court. To this process there existed only one category of exception, not a real one and not relevant in the immediate present context, namely where the Court's jurisdiction could clearly *only* exist if a specific *ad hoc* consent to it, relative to the actual case submitted, was given by the defendant State, and where (such consent evidently not being forthcoming) the Court removed it from its list without hearing argument: see, for example, the *Antarctica* and various *Aerial Incident* cases.<sup>1</sup> These cases apart, however—and Iceland's was not one of them—never, previous to that case, had a party to the Statute (and one, like Iceland, *prima facie* bound by a treaty-type acceptance of the Court's jurisdiction for the dispute) taken up the attitude that the Court's lack of jurisdiction was so self-evident as to need no demonstration and no formal appearance or filing of a preliminary objection for the purpose (but see the footnote below).<sup>2</sup>

To elaborate this point a little: States are of course fully entitled, when faced with an application to the International Court directed against them, to deny that the Court has jurisdiction to entertain that application. Furthermore, when the Court's jurisdiction is alleged to be founded on a treaty clause, or other equivalent text conferring jurisdiction on the court, the impugned State is fully entitled to deny that, in the particular circumstances of the case, the Court has such jurisdiction: e.g. the clause is not applicable to the particular facts of the case or the case comes under some exception. But in all such cases there has been at least a *prima facie* acceptance of the Court's jurisdiction so that the onus lies on the defendant State to show why this is not applicable. For this purpose, following the prescribed procedure and making such a denial in the course of an appearance before the Court for that purpose, and in willingness to accept the Court's decision on the matter (as Article 36 paragraph 6 of the Court's Statute enjoins), is clearly quite a different thing from adopting an

<sup>1</sup> See, e.g., *I.C.J. Reports*, 1956, pp. 6, 9, 12 and 15.

<sup>2</sup> There had naturally been previous cases of non-appearance or default of prosecution, but of a different character, and space forbids consideration of them here. Mention may, however, be made of certain aspects of the *Electricity Company of Sofia* and *Nottebohm* cases (*P.C.I.J.*, Series A/B, No. 80, at pp. 8–9, and *I.C.J. Reports*, 1953, p. 111, and 1955, p. 4) which were instances of only partial or interlocutory non-appearance; and of the third (compensation) phase of the *Corfu* case (*I.C.J. Reports*, 1949, p. 222) in which the Albanian Government totally ignored the proceedings, and in which (noticeably, in the light of the more recent practices) it made no attempt to apprise the Court of its views, even by unorthodox means; but in this case that Government had participated fully in the earlier jurisdictional and merits phases of the dispute. In the *Monetary Gold* case (*I.C.J. Reports*, 1954, p. 19) the non-appearance of Albania as (in effect) a defendant with a possible claim, led to the rejection of the main claims on the ground that Albania was a *necessary* party to the proceedings. Again, there have been cases of non-appearance in proceedings for the indication of interim measures of protection—e.g. the *Anglo-Iranian Oil* case (*I.C.J. Reports*, 1951, p. 89). But the very nature of this type of proceeding requires that it be not permitted to be frustrated by the defendant State's non-appearance. It is therefore *sui-generis*.

attitude equivalent to an *a priori* declaration that any adverse decision will not be accepted; that the Court's right to decide with binding effect will not be recognized; and that the Court's lack of jurisdiction being so patently obvious as to require no proceedings to establish it—any such proceedings will be ignored. But it is in this connection that the most paradoxical anomaly occurs: see the next paragraph.

If indeed the proceedings were truly ignored, that would at least be logical and an earnest (though a perverse one) of a certain element of sincerity, for the posture that the Court's lack of jurisdiction is so self-evident as to need no demonstration, entails that no attempt to demonstrate it be made. Far from that, however, something quite different happens. As mentioned above,<sup>1</sup> the State concerned, employing a variety of unofficial and unorthodox methods, takes care to bring to the notice of the Court all the essentials of its arguments on the jurisdictional issues involved.<sup>2</sup> Yet this ranks, or is supposed to rank, as comment on, rather than as participation in, the proceedings (like an actor who refuses to perform his part on the stage but speaks his lines from the wings so as to be heard in the auditorium); while for reasons to be discussed below, the Court has felt bound to take official cognizance of the information conveyed to it, and even—in at least one case<sup>3</sup>—to reach a conclusion *favourable* to the non-appearing State.

This brings us to the next aspect of these practices. In addition to the harm they do to the authority and prestige of the Court, there is the prejudice they cause to the plaintiff or applicant State which becomes severely handicapped in the presentation of its case before the Court. The reasons for this seeming paradox will be explained in due course, but it is an aspect of the matter that the Court appears steadfastly to have ignored in all five of the above-mentioned cases—thereby also (though doubtless unintentionally) overlooking the important principle of 'equality of arms' as between litigants, which it had itself honoured in a previous and quite recent affair.<sup>4</sup> The paradox is all the more striking inasmuch as the injustice to the plaintiff State arises precisely from the Court's determination not to be *unfair* to the *defendant* State by penalizing it for its non-appearance in the proceedings.

How is this paradox to be explained?—for at first sight it would seem as if nothing could suit the plaintiff State *better* than a posture of non-appearance and boycott of the proceedings by the defendant State, since

<sup>1</sup> See above, p. 89 n. 2.

<sup>2</sup> In the *Hostages (U.S. v. Iran)* case the existence of jurisdiction for the Court, on the basis *inter alia* of the 1961 Vienna Convention on Diplomatic Relations, was so clear that, after indicating interim measures of protection in favour of the United States, the Court proceeded straight to the merits, and Iran's commentary on the proceedings was directed largely to these. But see p. 114 below.

<sup>3</sup> The *Aegean Sea (Greece v. Turkey)* case—see p. 89 n. 3 above.

<sup>4</sup> *Review of Judgment No. 158 of the U.N. Administrative Tribunal (I.C.J. Reports, 1973, p. 166)*, in which the Court decided on the basis of the written pleadings alone, because Article 34 of the Court's Statute would have precluded any appearance at an oral hearing, effected by or on behalf of the individual U.N. employee concerned as such.

that amounts to a default, which should entail an automatic finding in favour of the former. In domestic law this is what would normally occur provided the proceedings had been regularly started, and disclosed a *prima facie* cause of action. But on the international plane the matter is not so simple:

(i) In the first place there is the principle that the competence of the Court in any given litigation is founded exclusively on, and can only be exercised with, the consent of both parties, either given *ad hoc*, or given generally and in advance under one or more instruments by which they are both bound, and conferring jurisdiction on the Court in respect of the case or category of case involved—the principle in short that States which are, in *this* sense, *non-consenters* to the assumption of jurisdiction by the Court cannot be under an obligation to appear before it or conform to its decisions. (It goes without saying, of course, that the question of the existence of consent, which is a technical question of law, or sometimes of mixed fact and law, is totally distinct from that of *willingness* to appear, although lay thinking often assimilates them. Many a State, consenting in law, proves unwilling in fact when it comes to a concrete case, but is nevertheless held to be bound by the consent it has given.) This consent principle, or rather—in its negative aspect—the principle of 'no consent, no jurisdiction', is so well established, and is regarded as so fundamental, that the Court has apparently felt bound to take account of it even where the defendant State's conduct appears to have laid it open to an adverse judgment by simple default. Yet it is perfectly possible to combine continued respect for the principle of consent with not according to the non-appearing State the latitude it now has.<sup>1</sup>

(ii) In any event the principle is reflected in Article 53 of the Court's Statute which provides for the possibility of default, and which begins by stating that

1. Whenever one of the parties does not appear before the Court or fails to defend its case, the other party may call upon the Court to decide in favour of its claim—

and then goes on to stipulate that

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction . . .<sup>2</sup> but also that the claim is well founded in fact and in law.

This makes it quite clear that a default does not *per se* and without further investigation entail a favourable judgment on the substantive merits of the dispute. What is not necessarily clear is the exact scope of the requirement that the Court must be satisfied that it has *jurisdiction*. This is discussed below;<sup>3</sup> suffice it for the present to say that it is at least arguable (though at present controversial) that the type of *a priori* total boycott of the

<sup>1</sup> See below, pp. 113, 116 and 120–1.

<sup>2</sup> The omitted words are 'in accordance, with Articles 36 and 37' (of the Statute); but the effect of the reference to these provisions (q.v.) is to make paragraph 2 of Article 53 apply in respect of jurisdiction generally.

<sup>3</sup> p. 120.



proceedings as such, involved in the device of 'non-appearance', which is very much of recent date, could not have been present as a possibility to the minds of the original drafters of the Statute in the period 1919–22. They would have assumed as a matter of course that any State a party to the Statute (and therefore bound to recognize the validity of paragraph 6 of its Article 36) against which a case was brought—and (this is important) *on the basis of a jurisdictional instrument* seemingly or arguably conferring jurisdiction on the Court (in other words a State having *prima facie* accepted the jurisdiction) would follow the practice invariably adhered to prior to the *Icelandic* case, as duly prescribed by the Statute and Rules of Court—namely that, if the State denied the existence of jurisdiction on the basis alleged, or any other basis, it would file a preliminary objection to that effect after entering an appearance in the case and appointing an agent, and would put forward its arguments in the prescribed manner, which the plaintiff State would have the opportunity of answering and which the Court would eventually pronounce upon.<sup>1</sup>

It could therefore be urged that where this procedure is not followed, and the defendant State simply ignores the proceedings—apart from, as it were, making carping noises in the wings—the Court would be entitled to regard the matter as one in which, though paragraph 2 of Article 53 was applicable, it was so only in respect of the substantive merits of the dispute, and not in so far as issues of jurisdiction were concerned. This could be done in either of two ways, the second of which is elaborated further below.<sup>2</sup>

(a) *by way of analogy with those national systems of law* which, in the event of non-appearance after a regular notification of the proceedings, deem the defendant in effect to have conceded the points at issue, or not to be contesting them: the Court would therefore consider that whatever the defendant State might be saying by means of what might be termed a semi-public soliloquy, it was not technically or *in concreto* contesting the Court's jurisdiction because not taking the prescribed formal steps to that end;

(b) *by way of analogy with the Court's now settled practice over the granting of interim measures of protection*, according to which this can be done so long as it appears that there exists an adequate *prima facie* basis (even if a contestable one) upon which the Court would be competent to hear and decide the merits: on that footing the Court could proceed to do just that, taking its competence to do so for granted in the absence of *formal* contestation following upon a regular appearance in the proceedings.<sup>3</sup>

Thus far, however, the Court has not seen fit to view the matter in the light of the foregoing basis; nor do any of the plaintiff Governments concerned appear to have made any serious attempts to induce it to do so.

<sup>1</sup> See further as to this, p. 96 below, following on extract No. 5.

<sup>2</sup> pp. 113 and 120.

<sup>3</sup> See, for a full development of this idea, pp. 113, 116 and 120–1 below.

The reasons for the Court's attitude, and their validity, will be considered later. What is of more immediate moment here is the frustration and injustice created for the plaintiff State. This was vividly brought out in the *Aegean Sea* case by one of the counsel for Greece—the late Professor O'Connell—in part of his opening address, as set out in the next section below.

## II. THE *AEGEAN SEA* CASE

Because of the new ground they broke, it is proposed to quote O'Connell's observations in the *Aegean* case verbatim<sup>1</sup> except for one or two minor omissions; but it will assist later reference to number the extracts. Introducing the subject he said:

[No. 1] Mr. President and Members of the Court, the failure of the respondent to appear in cases before the Court has now become such a regular feature of proceedings as to be almost a pattern. In the last four cases to be brought before the Court by unilateral application, the respondent has not appeared, but has addressed a letter to the Court in which, after informing the Court that no memorial would be filed or an agent appointed, made points which ought properly to have been made in the course of regular proceedings. These cases were the two stages of the *Fisheries Jurisdiction* cases, the two stages of the *Nuclear Tests* cases, the *Pakistan Prisoners of War* case and the two stages of the present case.

He then proceeded to refer in very mild terms to the perfunctory and inadequate language used by the Court in commenting on the 'non-appearance' practice (I shall deal with this later). What O'Connell said was:

[No. 2] In the first of these cases the Court said that the failure of the Respondent to appear in order to plead its objections or to make its observations against the Applicant's arguments and contentions in law was a matter 'to be regretted'. (*Fisheries Jurisdiction, Merits, I.C.J. Reports 1974*, para. 17). But the Court went no further than that, except to say that it had 'acted with particular circumspection' and had 'taken special care, being faced with the absence of the respondent State' (para. 17).

In the second of these cases the Court more or less repeated these expressions. It said that it was to be regretted that the Respondent had failed to appear in order to put forward its arguments on the issues and that the Court had thus not had the assistance it might have derived from such arguments or from any evidence adduced in support of them (*Nuclear Tests, I.C.J. Reports 1974*, para. 15).

He then stated the broad consequence, namely (to put it colloquially) that the practice was one that enabled the defendant—i.e. non respondent—State to have it both ways:

[No. 3] Before this Court the pattern that is coming to be established of

<sup>1</sup> The printed version in the series of the *I.C.J. Pleadings* is not yet available. These citations are from the typed transcript of the verbatim record CR 78/1 of 9 October 1978, pp. 44–51.

a one-sided litigation would seem to indicate that there is no disadvantage to the respondent in failing to file regular pleadings and to appear. Indeed, respondent States would seem to find it a positive advantage to boycott the proceedings, and, if that is so, serious questions arise concerning the judicial function, and hence the role of the Court.

O'Connell then spelt out in some detail what these questions were, drawing pointed attention to the lack of 'even-handedness' that must result from them (that is of course if free rein is to be given to the practice without any real attempt to curb or penalize it):

[No. 4] They arise because it is in the nature of the judicial function that parties be treated in an even-handed fashion. Yet, no matter how scrupulous a court may be in seeking to do this, this is not always possible when the respondent fails to appear but purports to communicate its views to the Court informally; under these circumstances the Court may feel obliged not merely to treat such communications as a matter of information but to attempt to take account of them as though they were formal legal contentions.

Both the Court and the applicant are put in an embarrassing position. The Court is embarrassed because, in order to preserve the judicial character of the proceedings it must take infinite pains to avoid putting itself in an adversary relationship with the applicant. And the applicant is embarrassed because it must satisfy the Court that the claim is well-founded in fact and law, without the benefit of hearing the arguments that the respondent ought to have made in support of its asseverations. It has to imagine the arguments that might be passing through the mind of the Court, whether they are so passing or not.

So, the applicant has to bring matters before the Court which ought properly to be brought before it by the respondent by way of preliminary objection, and the protection which the Court gives to the respondent paradoxically erodes the protection which the applicant has under the Court's Rules. The greater the protection to the respondent the more progressive is the shift in the balance in its favour.

This puts the applicant in a difficult position, arising from the fact that it does not know how far it must proceed in argument in order to dispel objections or refute contentions that have not been publicly aired, but which may, or may not, be entertained by Members of the Court.

An applicant put in such a position might even, in some circumstances, be denied justice. For its arguments might either go unnecessarily far, or not far enough. It might, by seeking to counter arguments that had not been put, but which imagination could conjure up, convey an impression of defensiveness or want of conviction. Yet, if it does not counter arguments which actually do occur to the Court, it might not discharge the burden of proof sufficiently.

The extraordinary habit which has developed of the respondent not appearing before the Court, yet of making assertions to it from the wings, as it were, leads in fact to anomaly, inconvenience and illogicality. In the present case, had the respondent appeared it should be sufficient for the applicant, at this stage of the hearing, to prove that there is a treaty between the parties which provides for the jurisdiction of the Court. It would then be up to the respondent to show, by way of preliminary objection framed according to Article 62 of the Rules of the Court, that the treaty is no longer in force. To show that, the respondent would need to



show that there is a rule of law whereby the treaty has terminated and to prove that facts have occurred upon which the operation of the rule is predicated. One would expect the proof of the existence of the rule, and the proof that the rule applies to the facts of the case, to be somewhat complex.

Mere asseveration, in regular proceedings, would obviously not suffice to disturb the balance of proof in favour of the applicant. Yet, when the proceedings are irregular, as they are in this case, the situation is apt to be different. . . .

Yet the Court has to take the asseveration seriously and make its own enquiries as to whether it is true or false. Inevitably this means that an irregular asseveration amounts to much more than a regular one, and by any reckoning that must be accounted an extraordinary situation. Not only does the applicant have the initial burden of proof, it has now thrust upon it the whole burden of proof, including a burden of negative proof.

O'Connell then drew specific attention to the fact that the Court's rules of court prescribe a definite and rather meticulous procedure for the case where the State arraigned wishes to enter a preliminary objection, whether as to the admissibility of the claim or the jurisdiction of the Court; the anomaly concerning the shifting of the burden of proof and the placing of a burden of *negative* proof on the plaintiff State, to which he had drawn attention, did not 'end there':

[No. 5] The anomaly does not end there. In regular proceedings the applicant would be bound by Article 62 of the Rules. The first condition is that a preliminary objection must be made in writing within the time limit fixed for the delivery of the Counter-Memorial, which, in the present case, was 24 April 1978. A second condition is that the objection shall set out the facts and the law on which the objection is based, the submissions and a list of the documents in support.

A third condition is that the applicant is then to be afforded the opportunity of presenting a written statement of its observations and submissions.

But when the respondent does not appear, these conditions remain unfulfilled. Obviously Article 53 of the Statute of the Court and Article 62 of the Rules *stand in uneasy conjunction* [my italics]. Article 62 is a rule to be applied rigorously when the respondent appears, but one easily evaded when it does not.

O'Connell went on to instance yet other anomalies that need not be mentioned here. But what did he have in mind in referring, as he did, in the last of the above-quoted passages, to the 'uneasy conjunction' of Article 53 of the Statute (judgment by default) and Article 62 of the Rules (procedure for making preliminary objections)? The question of the correct interpretation of Article 53 of the Statute has been considered above<sup>1</sup> (and I return to it later), but there can be little doubt as to what O'Connell had in mind: namely *first*, Article 62 of the Rules provides a detailed process for the making of preliminary objections as to jurisdiction or otherwise—formal written presentations by the objecting party within a certain time-limit, written reply by the other party, with the possibility of further written pleadings on the issue, and suspension of the proceedings on the merits

<sup>1</sup> pp. 92-3.

pending the Court's decision on the objection; *next*, Article 53 of the Statute provides that before giving a judgment in default on the merits against a State which 'does not appear before the Court, or fails to defend its case', the Court 'must . . . satisfy itself . . . that [*inter alia*] it has jurisdiction' in respect of the case; but, *finally*, it is precisely in the case of the 'non-appearing' State that the Court will *not* really (except by chance) have at its disposal the means of information and decision which the Article 62 of the Rules procedure was clearly intended to furnish it with, or will only become possessed of them by an irregular, unorthodox and random process which can never be better than highly unsatisfactory. How then can the Court be 'satisfied', given the complex and controversial nature of most jurisdictional issues?

Of course the difficulties over the interpretation and application of Article 53 of the Statute could, in theory, have arisen even before the present form of 'non-appearance' technique began to be employed; and the matter has in fact come up, though in a way that lacks relevance in the present context, in various older cases, as mentioned above.<sup>1</sup> But in *practice* (and apart from cases of requests for interim measures which are *sui generis*<sup>2</sup>) the question has only arisen, and was only likely to arise, in the form—not of an initial *ab origine* boycott and non-appearance—but of a supervening default in respect of some later stage of the proceedings, e.g. failure to file a written pleading within the specified time limit, non-appearance at the oral hearing, etc., which can be viewed as a species of abandonment or non-user of the Court's procedural facilities, rather than a denial of its jurisdiction. In any event there is normally—or there has been until the adoption of the recent technique—at least some material regularly and officially communicated to the Court by both parties, on the basis of which they can deal with each other's argument, and the Court can form an opinion. These are the sort of cases Article 53 was meant to apply to. The recent forms of non-appearance *ab origine*, coupled with irregular and unorthodox communications from the wings, appear to be on another plane. These are not cases like the others, of a sort of relinquishment or giving-up the attempt to prosecute or defend the case: they are cases of a total denial that the Court has any legitimate function to perform—a denial that refuses to admit or even discuss the bare possibility of anything else. It is the existence of this element which, I suggest, would justify the Court in handling the matter on the basis of one or other of the two courses outlined above,<sup>3</sup> and I have little doubt that some such idea was also in O'Connell's mind when he drew attention to the 'uneasy conjunction' of Article 53 of the Statute with the relevant provisions of the Rules.

Something of the kind might well prove a means, if not of stopping—at least of checking—this practice, for the effect would be to cut out the

<sup>1</sup> p. 90 n. 2.

<sup>2</sup> See *ibid.*

<sup>3</sup> p. 93, and see further pp. 113, 116 and 120-1 below.

jurisdictional phase of the case (so long as a possible or plausible, even if contestable, basis of jurisdiction appeared to exist—in short an antecedent *prima facie* acceptance of the jurisdiction) and enable the Court forthwith to proceed to, and give judgment on, the merits. This of course is the very thing that the 'recalcitrant' State is most anxious to avoid, for even if it maintains its posture of non-recognition or ostracism of the proceedings, and maintains that it was not a party to them and is not bound by the outcome, the judgment will remain and, if given against that State, will be liable to constitute a grave embarrassment and vantage point that will always be utilizable for the benefit of the other party. As things actually are however—and given the present attitude of the Court (see comments on this later)—the 'non-appearing' State stands (as happened in the *Aegean Sea* case) to obtain a favourable judgment on jurisdiction, excluding all consideration of the merits, although that State would never regularly have objected to, or presented formal argument about this, unless by way of 'noises off'. Small wonder then that O'Connell concluded his address to the Court on this aspect of the *Aegean* case with the following passage:

[No. 6] When all of these anomalies, inconveniences and illogicalities are added up, it becomes clear why respondents are likely to calculate that it is more advantageous to them to boycott the proceedings before the Court than to appear as active litigants.

But in fact there are much stronger motivations impelling the non-appearing State than a simple calculation of procedural and tactical advantage in the handling of the litigation—and something must be said about these before the attitude of the Court itself is considered—for the real object of the defendant State in these circumstances is not really to *win* the case through tactical cunning but to avoid *losing* it by means of a judgment that would be binding on it; in other words to ensure for itself a position in which, in the purely formal sense, it *cannot* 'lose' because it can maintain with more or less of plausibility that so far as concerns itself, the proceedings were *res inter alios acta*, and that the judgment (the adverse character of which it fears and anticipates) is a mere *obiter dictum* or academic expression of opinion by the Court. Furthermore (so it would be maintained) even if the Court's pronouncement did rank as a 'judgment', Article 59 of the Court's Statute would cause it to be binding only for the parties, and (so again it would be maintained) since the State concerned had never become formally a 'party' to the proceedings, it is not bound. (The validity of this argument is open to doubt, but I will not linger on the point now except for what is said in the footnote below.<sup>1</sup> I shall return to it

<sup>1</sup> The English text of Article 59 of the Statute, in providing that the judgment 'has no binding force except between the parties', fails to indicate whether this means parties to the dispute or parties to the *proceedings* before the Court—for the 'non-appearing' State is certainly a party to the *dispute*, if there is one. However, the French text refers to 'les parties en litige' (not 'au différend'), so presumably the proceedings were envisaged. The question would then arise whether mere *non-appearance* in the face of a formal citation under an (in itself) regular application to the Court (based on an apparent acceptance of its jurisdiction by the impugned State) suffices to invest the State concerned with



later, however, for it suggests one means whereby the non-appearance manoeuvre could in part be defeated.)<sup>1</sup>

### III. MOTIVATION OF THE NON-APPEARING STATE

Before considering more fully in the light of Professor O'Connell's arguments what the attitude of the International Court has been regarding the practices in question—a matter already touched upon above<sup>2</sup>—it will be well to get a better idea of what motivates States in resorting to them; for to say that it is the fear of losing the case<sup>3</sup> is only to state the obvious: it is the underlying frame of mind that counts, and this can be summarized in one phrase, namely the distrust and dislike of any binding *obligation* to submit to the jurisdiction of the Court. Here, the general proposition that such jurisdiction can only be exercised with the consent of the States concerned (i.e. of both or all of them) is felt by some of those States not to be good enough. It naturally is, *ex hypothesi*, good enough where that consent has been given *ad hoc* specifically in relation to the actual case submitted to the Court. The difficulty therefore invariably relates to the type of situation in which the consent invoked was given (or ostensibly given) generally, and in advance of the actual case (sometimes, it may be, years in advance), either by a treaty clause providing for the reference to the Court of all disputes concerning the interpretation or application of the treaty, or else under some jurisdictional instrument or clause the object of which is to provide in a general way for the settlement of disputes, however arising. Such instruments or clauses may relate to all disputes arising between the parties, or to certain categories only, or to all disputes excluding certain categories, or excluding the particular categories reserved by any party. They may be bilateral<sup>4</sup> but are as frequently of a multilateral character such as the General Acts of 1928 and 1949. For this purpose of course, the so-called 'Optional Clause' of the Statute of the International Court (Article 36 paragraph 2) ranks as a multilateral undertaking, since the various individual acceptances of it create a network of mutually inter-operating obligations within the limits of the

the character of being a 'non-party' to the proceedings—for one of the chief cases to which Article 53 of the Statute (the correct interpretation of which is here involved) applies is precisely that in which 'one of the parties does not appear before the Court', and even if this is read as referring to a party to the *dispute*, the fact that the same Article goes on to provide that the Court can, under certain conditions, decide the case against this 'party' (i.e. give judgment against it) would seem to indicate that it must be deemed to be a party for the purposes of Article 59 also and hence to be bound by the judgment; and see further, p. 116 n. 4 below.

<sup>1</sup> See p. 120 below, and see also p. 116 n. 4.

<sup>2</sup> p. 92.

<sup>3</sup> See p. 98 above.

<sup>4</sup> Like, for instance, the Belgo-Spanish Treaty of Conciliation, Judicial Settlement and Arbitration of 17 July 1927, that formed the basis of the Court's jurisdiction in the *Barcelona Traction* case (*Jurisdictional Phase*) (*I.C.J. Reports*, 1964, p. 6, at pp. 26-7 et seq.). For lists of many other such bilateral treaties concluded at about the same date or later, see the U.N. *Systematic Survey* 1928-48, pp. 3-12, and 1949-62, *passim*.

common ground covered by the two or more of them that may be involved.<sup>1</sup>

Put brutally, what happens is that States subscribe to a treaty, or general jurisdictional instrument or provision of the kind just described (probably more out of a, no doubt, praiseworthy desire to be, or to appear to be, good international citizens, than out of any real love for recourse to law), but then, when, in respect of a concrete case, it comes to implementing the obligations thus assumed, they find it inconvenient to do so and seek ways of avoidance. In this endeavour, as such, there is nothing new. What is new is the method employed, and it is in this context, in particular, that the motivation of States needs to be analysed.

The traditional and perfectly legitimate method was simply to deny the existence of the obligation on some such ground as, for example, broadly, that the jurisdictional provision concerned, on its wording, did not cover or relate to the case in hand, or that the case was taken out of the scope of the provision by some special circumstance, etc. This contention was then (as already mentioned) argued before the Court in a special preliminary, jurisdictional phase—often successfully—but, if unsuccessfully, then the resulting decision of the Court assuming jurisdiction was accepted (as it had to be under paragraph 6 of Article 36 of the Statute), and the State concerned proceeded to defend the substance of the complaint or claim made against it, on the merits. What then lies behind an attitude that in effect maintains *a priori* that it is by the *ipse dixit* of that State, and not by the decision of the Court, that the latter's competence to hear and determine the case is to be settled; and in consequence that any assumption of jurisdiction by the Court, and subsequent judgment on the merits (envisaged as adverse), will not be recognized as binding?

The answer can be expressed in a number of different ways, although they all reflect the same basic position, namely an insistence—whatever obligations have ostensibly been undertaken—on retaining a last-resort faculty, when faced with the concrete case, to reject submission of it to the Court, or at any rate to reject in advance the consequences of the submission made by the other party. Various strands of latent causation can be discerned here:

(i) If one considers the subject-matter of the recent disputes in which the attitude under discussion has been manifested, one can perceive in at least some of them distinct analogies to the type of case which, in nineteenth-century international relations, regularly led to certain classes of disputes being excluded *a priori* from any obligation otherwise entered into for having recourse to arbitration or judicial settlement—namely those involving the 'vital interests', honour or dignity of the parties—it being of the essence of the reservation that it was left to each party to

<sup>1</sup> For a list of certain judicial statements of the essential principle of coincidence or the common ground, see n. 4 on p. 150 of Shihata, *The Power of the International Court to Determine its own Jurisdiction* (Martinus Nijhoff, 1965).

determine for itself whether or not a given dispute fell within the scope of one of those concepts—its *ipse dixit* alone sufficing for that purpose. But the whole idea of the 'vital-interests' exception was of course supposed to have become discredited with the advent, after the First World War, of a more highly organized international community via the League of Nations, and subsequently the United Nations; and the establishment, on an institutional basis, of regular means of arbitral or judicial settlement through the Permanent Court of Arbitration, and the Permanent Court of International Justice (later the present International Court). The notion was also closely connected, though not identical, with another nineteenth-century concept, which equally became discredited or at least obsolete, that of 'non-justiciable' as opposed to 'justiciable' disputes, the latter capable of being resolved by the application of legal considerations and, if necessary, recourse to law, the former supposedly not. In a great many cases, though not in all, what a State regarded as affecting its honour or vital interests would also be considered as having a non-justiciable character. Underlying all this were feelings of national pride.

(ii) This is not the place to go into the reasons why these nineteenth-century concepts became discredited, and with what exact effect. The immediate point is that they are still, though discarded in principle, very much extant in fact and in the attitudes of States; although, as a matter of nomenclature, the cases involved could now more aptly be regarded as cases that are too 'sensitive', or too connected with 'prestige', to be submitted to any purely legal means of resolution. Looking at those O'Connell was personally involved in, and the others he referred to,<sup>1</sup> this is what we seem to see:

(a) The *Icelandic Fishery Limits* cases<sup>2</sup> would almost certainly have been regarded in the nineteenth century as classic instances of 'vital interests' even though the notion had seldom then been applied to interests of an economic character. Iceland's underlying<sup>3</sup> attitude was that—because of her peculiar dependence on fish, both as a comestible and as a wherewithal to export in return for essential commodities not procurable or producible locally<sup>4</sup>—the question of her exclusive fishery rights in the waters neighbouring her territory was so critical for her very survival that it could not be considered as 'justiciable', for since there

<sup>1</sup> See p. 94 above.

<sup>2</sup> *I.C.J. Reports*, 1973, p. 3 (*Jurisdictional Phase*) and 1974, p. 3 (*Merits*). For brevity, here and elsewhere, the page references are to the *U.K. v. Iceland* report only. That of the *Federal Republic of Germany v. Iceland* will always be found later in the same volume.

<sup>3</sup> Technically, Iceland's position was that the compromissory clause of the Anglo-Icelandic Exchange of Notes of 11 March 1961, providing for the submission of any disputes to the International Court, was not, or was no longer, applicable to the circumstances of the case. But by this clause Iceland had given a *prima facie* acceptance of the Court's jurisdiction, and the onus was on her to show cause *in proper form* why the clause was inapplicable.

<sup>4</sup> At least part of Iceland's claim to exclusive fishery rights in certain waters was motivated by the desire to be able to land a proportion of her catches, not in Iceland itself, but in various European countries (and in particular the United Kingdom and West Germany) for sale there.



could be no question of Iceland bowing to any decision that would seriously impair or diminish her fishery catch, there could be no point in submitting the matter to judicial decision. Thus, in a Note of 29 May 1972 received in the Court's Registry, the Government of Iceland stated that considering that the vital interests of the people of Iceland are involved [the Government] respectfully informs the Court that it is not willing to confer jurisdiction on the Court . . . [and] . . . an Agent will not be appointed to represent the Government of Iceland.<sup>1</sup>

(This of course quietly by-passed the essential question of whether Iceland had not *already conferred* jurisdiction on the Court under her antecedent fishery agreements with the United Kingdom and West Germany.<sup>2</sup>)

(b) In the *Nuclear Tests* cases,<sup>3</sup> the French Government (which was a party to jurisdictional instruments that could be applicable though France denied it<sup>4</sup>) clearly regarded any question of its right to carry out such tests in the Pacific as one that involved France's honour and dignity, and her status as a leading military power, and as a specifically nuclear power also. France could not tolerate even the possibility of a decision that might have the effect of placing her on a sort of second-class basis of rights, inferior to those of other States that had carried out above-ground tests in the desert or on the ocean. The need to test could of course also be represented as a matter relating to vital (defence) interests. Evidently this was a very sensitive matter for France and involved her prestige.

(c) Although the case of the *Pakistani Prisoners of War*<sup>5</sup> was not so clear cut, it was one in which India could well have regarded the charges of failure to repatriate prisoners of war and civilian internees at the close of hostilities, in alleged violation of the provisions of the relevant Geneva Conventions, and of maltreatment of some of these persons, as affecting her honour and dignity as a civilized country and leading Asian power. The probability of this having been India's feeling is increased by the fact that she had an exceptionally strong case on the jurisdictional aspects of the dispute, so that the Court would have been likely to declare itself incompetent if matters had got that far;<sup>6</sup> but a settlement was reached and Pakistan withdrew her application. India, however, maintained the 'no-appearance' posture throughout, though furnishing copious comment off-stage. Her attitude can best be seen from the following conclusion which she offered—not in argument before the Court, or in any formal pleading, but through a statement addressed to the Registrar by the Indian

<sup>1</sup> *I.C.J. Reports*, 1973, p. 7.

<sup>2</sup> See p. 101 n. 3 above.

<sup>3</sup> *I.C.J. Reports*, 1974, p. 253 (here again only the *Australia v. France* report is, or will be, cited: the report of the parallel case of *New Zealand v. France* occurs later in the same volume).

<sup>4</sup> These were an Optional Clause declaration and the General Act of 1928.

<sup>5</sup> *I.C.J. Reports*, 1973, pp. 328, 344 and 347.

<sup>6</sup> I personally consider that India's case was misconceived, but it was a strong one, and the points involved were such as, in the light of subsequent cases, there is good reason to think would have prevailed with the majority.

Ambassador in The Hague in which, after setting out in great detail, and much as if it had been a formal pleading, India's views on one of the main jurisdictional issues involved, he ended by saying that

In view of the above, when the absolute absence of jurisdiction is so patent and manifest at the threshold of the institution of proceedings, the question of summoning the parties for a hearing to determine [the Court's] jurisdiction does not arise. The only proper action for the Court to take, after by itself [i.e. without hearing the parties] examining the Application and the Request in the light of India's observations, is to remove the Application from the list<sup>1</sup> by an administrative order [i.e. presumably, not by means of a *judicial* pronouncement<sup>2</sup>].

These remarks exhibit very clearly the attitude taken up by all the States that have had recourse to this technique—i.e. of the absence of jurisdiction being too self-evidently obvious to require argument, so that a formal appearance by the State concerned to make good its stand on jurisdiction would be superfluous and almost an unnecessary imposition. India, moreover, made clear by implication, in various ways, her suspicion that Pakistan's application was not motivated by any genuine concern for the individual prisoners and internees, and private interests involved, but had a political object,<sup>3</sup> just as France seems to have entertained a somewhat similar idea in the *Nuclear Tests* cases.

(d) In the *Aegean Sea Continental Shelf* case<sup>4</sup> it may be difficult at first sight to discern any considerations of vital interests, honour or dignity to account for Turkey's 'no-appearance' attitude,<sup>5</sup> unless the mere possibility of the presence of oil in the ground that was the subject-matter of the dispute is deemed automatically to constitute a 'vital' interest. But, both on historical and geographical grounds, the presence of Greek islands studding the Aegean right up to a close proximity with the Turkish coast of Asia Minor, tending to turn the entire Aegean sea bed, or a major part of it, into Greek continental shelf, created an issue regarded by Turkey as a particularly sensitive one involving, if not honour or dignity, then historic thin-ice. In the result, the use of the 'no-appearance' technique proved unnecessary; for the Court, even in the absence of proper argument by Turkey (except for unorthodox and irregular communications) found that it lacked jurisdiction; and Greece's claim on the merits was never heard. But the issue was a difficult one—the result could well have been different—and O'Connell's argument<sup>6</sup> was that Greece (like any similarly

<sup>1</sup> India was here confusing the case with the *forum prorogatum* type of case (see p. 90 above) which I later (pp. 113 et seq. below) call 'class (A) cases', in which there is no *possible* basis for the Court's jurisdiction. But India was a party—though with certain reservations—to a jurisdictional clause providing for submission to the Court of disputes of the kind concerned—and Pakistan denied that India's reservations operated to exempt the case. This therefore was clearly a matter for *the Court* (not India) to decide under Article 36 paragraph 6 of the Statute.

<sup>2</sup> *I.C.J. Pleadings, Oral Arguments and Documents in the case*, p. 131.

<sup>3</sup> See, for instance, the volume of pleadings and correspondence in the case (previous note) at p. 124.

<sup>4</sup> *I.C.J. Reports*, 1978, p. 3 (*Jurisdiction*).

<sup>5</sup> Turkey was ostensibly a party to the 1928 General Act for the Settlement of Disputes which Greece invoked.

<sup>6</sup> See No. 4 at p. 95 above.

placed claimant State) was handicapped in the presentation of her argument on the jurisdictional issue by Turkey's absence from the proceedings and failure to put forward her case in the proper way and at the proper time. The Court, however, took absolutely no account of this aspect of the matter—a point I shall revert to later.

(e) In the case of the *American (Diplomatic and Consular) Hostages in Iran* (to be referred to henceforth as the *Iranian Hostages* or *Hostages* case),<sup>1</sup> considerations, if not of vital interests, then of honour and dignity, can be discerned in the attitude of Iran which was, broadly, that the question of the hostages could not rightly be separated from that of Iran's grievances against the United States, so that . . .

The Court cannot and should not take cognisance of the case which the Government of the United States of America has submitted to it, and in a most significant fashion, a case confined to what is called the question of the 'Hostages of the American Embassy in Tehran'.<sup>2</sup>

In addition, Iran contended (amongst other things) that

any examination of the numerous repercussions [involved by 'the revolution of Iran'] is a matter essentially and directly within the national sovereignty of Iran.<sup>3</sup>

These contentions (which related to questions of the admissibility of the U.S. claim rather than of the jurisdiction of the Court) amounted of course to perfectly respectable legal arguments whether correct or not, but Iran never appeared in order to make a formal and regular presentation of them, nor did she do so at the subsequent stage of the merits;<sup>4</sup> and as this was a case in which the existence of jurisdiction for the Court on the basis of the Vienna Diplomatic and Consular Conventions of 1961 and 1963 was utterly clear and almost beyond the possibility of being seriously controverted, it becomes in consequence difficult to see Iran's as other than a rejection *a priori* of any *finding* against her, and a preparation of the ground for maintaining that she was not a party to the proceedings and not bound by their outcome. At the same time the highly 'sensitive' nature of the case from her point of view cannot be doubted.

The no-appearance technique can also be seen as a revival of other devices, less creditable than those deriving from pleas of vital interests or honour, devices the essential ingredient of which was to obtain the kudos implicit in an apparently general—or at any rate reasonably comprehensive—acceptance of the obligatory jurisdiction of the International Court, but to frame this in such a way that the obligation could be avoided in any concrete case in which it was inconvenient to conform to it. The most notorious of these devices was the so-called 'automatic reservation' attached to an acceptance, otherwise general. Under this reservation any

<sup>1</sup> For references concerning the merits phase of the case, see p. 111 n. 2 to p. 112 n. 1 below. For the interim measures phase, see the Court's Order of 15 December 1979 (*I.C.J. Reports*, 1979, p. 7).

<sup>2</sup> During the interim measures phases: see *loc. cit.* (previous note) at p. 11.

<sup>3</sup> *Ibid.*

<sup>4</sup> Reference in n. 1 above.



determination (i.e. *ipse dixit*) on the part of the reserving State, to the effect that the dispute concerned came within the scope of the reservation, was to be conclusive, and must cause the Court to decline jurisdiction.<sup>1</sup> The courageous line taken about this kind of reservation in the *Norwegian Loans* and *Interhandel* cases by Sir Hersch Lauterpacht and certain other judges<sup>2</sup> did much to discredit the practice and diminish its utilization. *But the no-appearance technique is aimed at exactly the same result*, namely to reduce to a purely voluntary act what was undertaken as obligatory (or ostensibly so); and it achieves this in so far as it enables—or seems to enable—the non-appearing State to maintain that it is a stranger to the proceedings and to their outcome.<sup>3</sup>

Another device was the practice, fairly widely resorted to at one time (and by no means abandoned now), by which States, though placing no actual limit of time on the duration of their acceptances, or else giving them a duration of five or ten years unless previously withdrawn, reserved the right to withdraw them at will, and at any moment, by a notice given to the Secretary-General of the United Nations. Thus as soon as any proximate threat of being taken to the Court seemed likely to materialize, the acceptance could be withdrawn before any concrete application was actually made. Originally there was some excuse for this particular practice;<sup>4</sup> yet it was obviously destructive of the reality of the Court's compulsory jurisdiction which it tended to reduce to a mere fiction or pretence, and again to turn the seemingly obligatory into the merely voluntary. This was pointed out in a major article by Sir Humphrey Waldock, subsequently a judge and President of the International Court, entitled the 'Decline of the Optional Clause'.<sup>5</sup> In his concluding paragraph Sir Humphrey, while expressing some understanding of the reasons which might at the present time make States reluctant to undertake irrevocable commitments, suggested that the

immediate objective must be . . . to prevent the further deterioration of State practice in framing the terms of declarations, which, if not checked, may bring

<sup>1</sup> In effect, because of the imprecise but wide-ranging and almost all-embracing character of the subject-matter selected for reservation—e.g. all matters (considered to be) of domestic jurisdiction, all matters (regarded as) pertaining to national security—they got very near to the vital interests exception.

<sup>2</sup> *I.C.J. Reports*, 1957 and 1959. The other judges were Presidents Guerrero, Klaestad and Spender, and Judge Armand-Ugon.

<sup>3</sup> But of course the Court can and does ignore this and give a decision although, paradoxically, this can be in *favour* of the non-appearing State—see p. 91 above—whereas the theory of the automatic reservation (never actually tested *in concreto*) is that the Court *must* accept the unilateral determination of the reserving State, and decline jurisdiction.

<sup>4</sup> There had currently been a tendency for States which had not accepted the Optional Clause jurisdiction of the Court suddenly to do so for the purposes (but only for the purposes) of a particular dispute that had developed with a State that had already previously given a general and long-standing acceptance in terms that would cover this dispute. Technically, then, there was reciprocity in relation to the actual dispute but, in the wider sense, not. To retain a faculty of, so to speak, overnight withdrawal of an otherwise long-standing acceptance afforded the only possible, and even so not always sure, safeguard.

<sup>5</sup> *This Year Book*, 32 (1955-6), p. 244.

the whole system into disrepute and produce . . . a contraction of the Court's compulsory jurisdiction. . . .<sup>1</sup>

It is therefore a little disturbing to find that even during Sir Humphrey's term on the Court (which included the final phase of the *Icelandic Fisheries* case, and the *Nuclear Tests* cases), and even under his Presidency (which included the *Aegean* and *Hostages* cases), the Court has not made any move to counter, nor yet seriously to condemn, the 'no-appearance' technique, although—far more than the practices which he so rightly deprecated—is that technique likely to 'bring the whole system' of the Court's obligatory jurisdiction into disrepute and lead not merely to a 'contraction' but to a virtual obliteration of it. This leads to a penultimate section in which the exact nature of the Court's attitude, and the reasons for it, will be discussed.

#### IV. THE COURT

It might seem somewhat tedious to quote *in extenso* the pronouncements which the Court has made on this subject, especially since these tend to have a distressing sameness, the language employed in the one case doing duty, with only slight variations and in almost the same words, for the others. However, since Professor O'Connell in the *Aegean Sea* case, for obvious reasons, referred only briefly to their inadequacy and was understandably unwilling to stress this too much,<sup>2</sup> something must be said about it here. It should nevertheless be emphasized that this inadequacy did not relate to any failure to explain the *formal* reasons why the Court felt unable to visit upon the non-appearing State the natural consequences of its conduct. The inadequacy resided (*a*) in the extremely mild and quite uncensorious terms in which this was referred to, and (*b*) in the total failure to recognize the prejudice thereby caused to the plaintiff State, although the difficulty caused for the Court itself was mentioned in some of the cases. Broadly, the Court rested content with simply 'regretting' the non-co-operation of the defendant State, and explaining why all the same it felt that it had to proceed as if that co-operation had in effect been forthcoming, and as if (for all practical purposes) that State was in fact appearing and arguing its objections in the normal way—thereby, as O'Connell so vividly pointed out, reaping a great part of the advantages of appearing and defending in proper form while purporting not to incur the disadvantage of being bound by the result—a 'heads I win, tails you lose' situation—a classic example of 'fail-safe' technique in a field where there should be no place for it. But the Court has in each of the cases involved

<sup>1</sup> These prognostications, as they had developed in the fourteen or so years since Sir Humphrey's article, were followed up in an interesting paper read to the British branch of the International Law Association in November 1979, by Mr. John Merrills of the Law Faculty of Sheffield University. Also, a recent article by Mr. Merrills on 'The International Court of Justice and the General Act of 1928' in the *Cambridge Law Journal*, 39 (1980), contains at pp. 161–3 some particularly apt observations on the 'non-appearance' problem.

<sup>2</sup> See No. 2 at p. 94 above.

'bent over backwards' as it were, to ensure that no untoward consequences should ensue for the non-appearing State.<sup>1</sup> The Court moreover, while making token noises of deprecation (a sort of judicial 'tut-tut') has, in effect, argued that it had no real choice in the matter (which, as I shall hope to show in later paragraphs, is simply not correct). The process started in the jurisdictional phase of the *Icelandic Fisheries* case which, being the first of these occasions, should have been given severe treatment.<sup>2</sup> Instead, the Court began by saying no more than that it was

to be regretted that the Government of Iceland has failed to appear in order to plead the objections to the Court's jurisdiction which it is understood to entertain.<sup>3</sup>

From these words it is clear that the Court did not regard the views unofficially conveyed to it by Iceland as constituting a *plea* of objection, i.e. as amounting to the making of a regular preliminary objection of the kind contemplated by the Statute and Rules of Court. Thus it should logically have followed that Iceland, while emitting rumblings of negation and denial, was not technically entering any *formal* objection to the Court assuming jurisdiction, so that the Court (provided there appeared to be a reasonably possible basis of jurisdiction—such as had sufficed to enable it to indicate interim measures of protection<sup>4</sup>) could at least have cut out the jurisdictional phase of the case entirely (if need be on a 'joinder' basis) and proceeded straight to the merits. This is in fact what occurred some seven years later in the *Iranian Hostages* case.<sup>5</sup> In the *Icelandic Fisheries* case, therefore, the Court should simply have said that it was not prepared to entertain any objections to its jurisdiction that were not made in the form prescribed by the Statute and Rules of Court. Far from so doing, however, it followed up the above-quoted passage by explaining that 'Nevertheless'—in spite of Iceland's 'regretted' conduct—

The Court, in accordance with its Statute and its settled jurisprudence, must examine *proprio motu* the question of its own jurisdiction to consider the Application of the United Kingdom. Furthermore, in the present case the duty of the Court to make this examination on its own initiative is reinforced by the terms of Article 53 of the Statute of the Court. According to this provision, whenever one of the parties does not appear before the Court, or fails to defend its case, the Court, before finding upon the merits, must satisfy itself that it has jurisdiction.<sup>6</sup>

The Court therefore did not even consider whether, in the unusual and unprecedented circumstances, there might not be some other view that

<sup>1</sup> The care with which the Governments of the non-appearing States were notified by the Court's Registry of every stage in the proceedings, and given the most ample opportunities of appearing, pleading, commenting or giving information, can readily be seen from the correspondence included in the published volumes of *Pleadings, Oral Arguments, Documents* for each of the cases concerned.

<sup>2</sup> I myself sat in it, but see p. 109 and p. 117 n. 1 below.

<sup>3</sup> *I.C.J. Reports*, 1973, at p. 7, paragraph 12.

<sup>4</sup> See for instance, in the case of *West Germany v. Iceland*, the Order of the Court of 17 August 1972, *I.C.J. Reports*, 1972, p. 30. See also p. 93 above and pp. 113, 116 and 120–1 below.

<sup>5</sup> For references see p. 104 nn. 1 and 2 above.

<sup>6</sup> *Loc. cit.* at n. 3 above.



could reasonably be adopted as to the effect of Article 53—e.g. on the lines suggested above<sup>1</sup> and considered further below.<sup>2</sup> Rather did it go on to say:

It follows from the failure of Iceland to appear in this phase of the case that it has not observed the terms of Article 62, paragraph 2, of the Rules of Court, which requires *inter alia* that a State objecting to the jurisdiction should 'set out the facts and the law on which the objection is based', its submissions on the matter and any evidence which it may wish to adduce. Nevertheless the Court, in examining its own jurisdiction, will consider those objections which might, in its view, be raised against its jurisdiction.<sup>3</sup>

This of course was one of the very points made some years later by O'Connell in the *Aegean* case.<sup>4</sup> But instead of seeing it as a ground for inflicting some sort of penalty for the failure to observe Article 62 paragraph 2 of its Rules, the Court merely announced its intention of proceeding as if that failure had not occurred!

After assuming the jurisdiction which had all along obviously existed in the *Icelandic* case, the Court in a later phase (in which I did not sit) proceeded to the merits and, on this aspect of the matter, began by virtually repeating what it had said in the earlier phase:

It is to be regretted that the Government of Iceland has failed to appear in order to plead its objections or to make its observations against the Applicant's arguments and contentions in law. The Court however, as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute.<sup>5</sup>

The Court then added the following rather startling remark:

It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.<sup>6</sup>

It is difficult to believe that the Court was here seriously intending to lend its authority to the proposition that a party affirming the existence of a rule of law in the course of proceedings before the Court need not make good that affirmation—or even present argument about it—that the matter can simply be left to the Court because '*jus novit curia*', but this is what it seemed to be saying.<sup>7</sup> However, it continued:

In ascertaining the law applicable in the present case the Court has had

<sup>1</sup> p. 92.

<sup>2</sup> pp. 113, 116 and 120-1.

<sup>3</sup> *I.C.J. Reports*, 1973, pp. 7-8.

<sup>4</sup> See No. 4 and 5 at pp. 95-6 above.

<sup>5</sup> *I.C.J. Reports*, 1974, at p. 9, paragraph 17.

<sup>6</sup> *Ibid.*

<sup>7</sup> I am perhaps being a little unfair. The intended meaning (though not well expressed) must have been that the law is the law, and is whatever it is, whether or not the party concerned manages to establish its propositions, whereas the onus of establishing allegations of fact lies on the party making them and failure to do so may *per se* be deemed to negative the allegations.

cognizance not only of the legal arguments submitted to it by the Applicant but also of those contained in various communications addressed to it by the Government of Iceland, and in documents presented to the Court. The Court has thus taken account of the legal position of each Party. Moreover, the Court has been assisted by the answers given by the Applicant, both orally and in writing, to questions asked by Members of the Court during the oral proceedings. It should be stressed that in applying Article 53 of the Statute in this case, the Court has acted with particular circumspection and has taken special care, being faced with the absence of the respondent State.

Accordingly, for the purposes of Article 53 of the Statute, and subject to the matters mentioned in paragraphs 71 to 76 below, the Court considers that it has before it the elements necessary to enable it to determine whether the Applicant's claim is, or is not, well founded in fact and law, and it is now called upon to do so.<sup>1</sup>

This amounted to saying that so far from visiting the non-appearing State with any kind of disability, it proposed to do the exact opposite and virtually place that State in a better position than if it had appeared. Moreover, despite the complacent assumption of being fully informed, a Court can never be as fully instructed in such circumstances as it would be if both parties had appeared to present their respective arguments, answering each other *seriatim*, and both (not merely one of them) available to answer questions put by the Court or individual judges (this of course is, *inter alia*, precisely the sort of thing the non-appearing State wants to avoid).

Since I was myself still a member of the Court at the time of the *jurisdictional* phase of the *Icelandic* case (but had left it before the subsequent merits phase), I ought perhaps (having regard to the views I have expressed above) to indicate what line I personally then took. It was as follows (I could have said much more, but hoping that Iceland's attitude might change for the merits phase, or if not, that the Court might then take up a less indulgent attitude, I refrained):

In conclusion, and although the matter may be a somewhat sensitive one for me personally to refer to, I should like—since I shall not be participating in the next phase of the case—to comment briefly on the course followed by Iceland with reference to the proceedings before the Court, so far as they have gone up to date. It may have been understandable, though difficult to reconcile with the attitude to the Court which a party to its Statute ought to adopt, that Iceland should declare herself to be so convinced of the Court's lack of any competence to entertain the present dispute, that she would not take any part in the proceedings, and would not enter an appearance or be represented, even in order to argue the question of competence. Had she done this on a once-and-for-all basis, giving her reasons, and thereafter maintained silence, there would have been no more to be said except to call her absence misguided and regrettable. In fact however Iceland has sent the Court a series of letters and telegrams on the subject, often containing material going far beyond the question of competence and entering deeply into the merits, and has lost no opportunity of doing the same thing through statements made or circulated in the United Nations, and by other means, all of which have

<sup>1</sup> Loc. cit. at p. 108 n. 5 above, pp. 9–10, paragraphs 17 and 18.

of course been brought to the attention of the Court in one way or another as, doubtless, they were intended to be. This process is unfortunately open to the interpretation of being designed, on the one hand, to place Iceland in almost as good a position as if she had actually appeared in the proceedings—(because the Court has in fact carefully considered and dealt with her arguments)—while on the other hand enabling her, in case of need, to maintain that she does not recognize the legitimacy of the proceedings or their outcome—as indeed she has already done with respect to the interim measures indicated by the Court in its Order of 17 August 1972.

There is yet time for Iceland to show that this interpretation is mistaken; and it is my sincere hope that she will do so.<sup>1</sup>

In the case of the *Pakistani Prisoners of War*<sup>2</sup> the parties reached an agreement, and Pakistan's application was withdrawn before the Court was called upon to comment on India's non-appearance. Moreover, the only concrete proceedings that had up till then taken place were upon Pakistan's request for the indication of interim measures, which she subsequently asked the Court to postpone pronouncing upon (in view of a possible settlement)—and it is in any case received law that the absence or non-appearance of a party cannot of itself prevent the indication of interim measures against it, or there would always be an obvious means of frustrating the request for these.<sup>3</sup> In the *Nuclear Tests* cases, on the other hand, although in the end the Court declined to give any operative finding, on the ground that Australia's and New Zealand's claims had, in the circumstances that had arisen, become 'moot' (*'sans objet'*), it nevertheless made the following brief comment on France's attitude of non-appearance:

It is to be regretted that the French Government has failed to appear in order to put forward its arguments on the issues arising in the present phase of the proceedings, and the Court has thus not had the assistance it might have derived from such arguments or from any evidence adduced in support of them. The Court nevertheless has to proceed and reach a conclusion, and in doing so must have regard not only to the evidence brought before it and the arguments addressed to it by the Applicant, but also to any documentary or other evidence which may be relevant. It must on this basis satisfy itself, first that there exists no bar to the exercise of its judicial function, and secondly, if no such bar exists, that the Application is well founded in fact and in law.<sup>4</sup>

Having regard to its view that the claims in this case had become objectless, so that it was not called upon to pronounce upon them, or even upon its competence to do so (contested by France *à la cantonade*<sup>5</sup>), the

<sup>1</sup> *I.C.J. Reports*, 1973, paragraphs 21 and 22 of my separate opinion at p. 35 of the volume—and see p. 117 n. 1 below.

<sup>2</sup> See *loc. cit.* at p. 102 n. 5 above.

<sup>3</sup> See, for instance, *passim*, the Court's Orders of 17 August 1972, 22 June and 13 July 1973, and 15 December 1979, in regard to interim measures in the *Icelandic*, *Nuclear Tests*, *Prisoners of War* and *Hostages* cases respectively, in *I.C.J. Reports* for those years.

<sup>4</sup> *I.C.J. Reports*, 1974, p. 257, paragraph 15.

<sup>5</sup> Expression used in French theatrical parlance for 'in the wings' or 'off-stage'.



Court could have excused itself from making the remarks just quoted, the sweet reasonableness of which may be beguiling but misleading. However, it is perhaps to be welcomed that, even in these very anodyne terms, the Court did so, and also called attention to the prejudice thereby caused to it. But nothing was said about the handicap involved for the other party in the presentation of its case. In passing, one may wonder why the Court so definitely mentioned the prejudice to itself in the *Nuclear* cases, whereas in the *Icelandic* cases, apart from the reference to Article 62 of the Rules, it seemed to think it had in almost abundant measure all it needed in order to come to a considered conclusion.

Most disappointing of all was the comment made by the Court in the *Aegean Sea* case, for, as has been seen earlier, this was a case in which the anomalies and irregularities of the no-appearance technique had been drawn pointedly to its attention by Professor O'Connell. The jurisdictional issues involved were, moreover, exceptionally difficult, and there were grounds to justify the belief that the defendant State's failure to present its jurisdictional objections in the proper form, at the proper time and in the prescribed way, must have caused the plaintiff State serious difficulties in dealing with them. Yet all that the Court said amounted to no more than a perfunctory repetition of observations made on previous occasions, thus:

It is to be regretted that the Turkish Government has failed to appear in order to put forward its arguments on the issues arising in the present phase of the proceedings and the Court has thus not had the assistance it might have derived from such arguments or from any evidence adduced in support of them. Nevertheless, the Court, in accordance with its Statute and its settled jurisprudence, must examine *proprio motu* the question of its own jurisdiction to consider the Application of the Greek Government. Furthermore, in the present case the duty of the Court to make this examination on its own initiative is reinforced by the terms of Article 53 of the Statute of the Court. According to this provision, whenever one of the parties does not appear before the Court, or fails to defend its case, the Court, before finding upon the merits, must satisfy itself that it has jurisdiction.<sup>1</sup>

In the *Iranian (Hostages)* case (*Merits*)<sup>2</sup>—latest of the series—the Court, with one important exception to be mentioned in a moment, remained content with a quasi-mechanical repetition of its previous attitudes and formulations on the subject. Indeed, at the start of its judgment it did no more than make a bland reference to the fact of Iran's absence, without comment:

No pleadings were filed by the Government of Iran, which also was not represented at the oral proceedings, and no submissions were therefore presented on its behalf.<sup>3</sup>

<sup>1</sup> *I.C.J. Reports*, 1978, at pp. 7–8, paragraph 15.

<sup>2</sup> *Ibid.*, 1980, p. 3. The previous interim measures phase, indicative of Iran's attitude, has been noticed at p. 104 above. Like all such cases, it throws no real light on the 'non-appearance' question—see p. 110 and p. 90 n. 2 above.

<sup>3</sup> *Ibid.*, at p. 8. The Court added that, however, the 'position' of Iran had been 'defined in two

It was only considerably later in the judgment that the Court vouchsafed the usual token expression of regret, to the effect that

It is regretted that the Iranian Government has not appeared before the Court to put forward its arguments on the questions of law and fact which arise in the present case; and that, in consequence, the Court has not had the assistance it might have derived from such arguments or from the evidence adduced in support of them.<sup>1</sup>

Again, however, no recognition at all of the even greater prejudice that might thereby have been caused to the plaintiff in the case. This passage was immediately followed by the now trite invocation of Article 53 of the Statute. Having earlier stated that

The position of the Iranian Government in regard to the present proceedings brings into operation Article 53 of the Statute, under which the Court is required, before finding in the Applicant's favour, to satisfy itself that the allegations of fact on which the claim is based are well founded.<sup>2</sup>

the Court continued as follows:

Nevertheless [i.e. despite absence of Iranian argument], in accordance with its settled jurisprudence, the Court, in applying Article 53 of its Statute, must first take up, *proprio motu*, any preliminary question, whether of admissibility or of jurisdiction, that appears from the information before it to arise in the case and the decision of which might constitute a bar to any further examination of [its] merits . . .<sup>3</sup>

The error here does not only arise from the patent fact that 'the information before it' must, by definition, be incomplete and (as concerns questions of 'admissibility or . . . jurisdiction . . . which might constitute a bar' to any further proceedings) based not on any regular plea or objection claimed to arise under these heads, and extant as part of the Court's official *dossier* in the case, but on communications which, within the context of a judicial proceeding, are heterodox and apocryphal. The error also results from the complete failure even to consider the possibility of any alternative interpretation of Article 53 of the Statute.

The vice is that in its endeavour to conform to Article 53—an endeavour that is correct in itself—the Court is not content with being satisfied—as it broadly is when dealing with requests for the indication of interim measures—that there exists a possible or *prima facie* (say credible) basis of jurisdiction in the form of, for example, an acceptance of the Court's compulsory jurisdiction under the Optional Clause of the Statute, or under

communications addressed to the Court by the Minister for Foreign Affairs of Iran'. This shows that the Court is well aware of the distinction between pleadings that are an official part of its dossier in the case, and adventitious communications that are not, which makes it all the more difficult to understand its attitude in certain particular respects—see, *inter alia*, p. 96 above.

<sup>1</sup> *I.C.J. Reports*, 1980, p. 18. The same sort of point arises on this passage as that mentioned in the previous note. By necessary implication the Court admitted that, conventionally and ostensibly, it *had not been presented with any arguments* on behalf of Iran. Yet it proceeded to behave exactly as if it had!

<sup>2</sup> *Ibid.*, at p. 9.

<sup>3</sup> *Ibid.*, at p. 18.

some treaty clause for the judicial settlement of disputes. The Court thus fails to draw the requisite distinction between the case (call it a class (A) case) where such a *prima facie* basis is totally non-existent, and the case—class (B)—where it does exist but the State concerned denies its validity or applicability in the particular circumstances of the dispute before the Court. What the Court ought to do is, if no such *prima facie* basis appears to exist at all (class (A) cases), to declare itself incompetent; while if—(class (B))—such a basis does appear to exist, to inform the Government impleaded that unless it appears before the Court to show cause why jurisdiction should nevertheless not be assumed, the Court will proceed to do so, and will go on to hear and decide the merits.<sup>1</sup> It would be perfectly proper for the Court to declare itself 'satisfied' for the purposes of Article 53 that it had jurisdiction, on the basis of the presumed validity and applicability of an instrument the validity and applicability of which had not been challenged in proper form. But in concrete fact, what the Court proceeds to do, wherever the occasion arises, is to deal in detail with the question of validity and applicability, exactly as if a *regular* plea of invalidity or non-applicability had been made—(and a 'regular' plea involves an appearance in the case)—instead of unorthodox communications that are not part of the *dossier*. If States knew that only in class (A) cases (and they are extremely rare in practice<sup>2</sup>) would the Court decline jurisdiction, and that in class (B) cases—where there exists a *prima facie* acceptance of its jurisdiction—the Court would consider itself competent unless there was an appearance and objection in proper form—the whole non-appearance technique would be stopped dead in its tracks—or at least it would no longer pay, would no longer serve any real purpose.<sup>3</sup>

Finally in the present context, the Court in the *Hostages* case repeated its previous remarks as to the adequacy of its means of information. Citing the *Corfu Channel* case<sup>4</sup> in support of the view that it suffices 'for the Court to convince itself by such methods as it considers suitable',<sup>5</sup> it continued:

In that respect the Court observes that it has had available to it, in the

<sup>1</sup> Actually, the Court did take a sort of first step in this direction in the *Hostages* case—see p. 114 below.

<sup>2</sup> They are rare because, if it is known (as it will be if it is in fact the case) that a State has not accepted the Court's compulsory jurisdiction in any form, or become a party to any treaty involving obligatory reference of disputes to the Court, other States will not normally go through the futile motions of trying to take it there. The only exceptions are in the *forum prorogatum* type of case brought chiefly for purposes of publicity and exemplified by the *Aerial Incident* and *Antarctica* categories of cases that occurred in the decade 1950–60. These involved the forlorn hope, though not the expectation, that the Court's jurisdiction might be accepted voluntarily *ad hoc* for the purposes of the dispute.

<sup>3</sup> This needs spelling out a little perhaps. Apart from any political kudos or emotional satisfaction to be derived from 'non-appearance', the solid forensic advantage to be gained is that under its present practice the Court, going fully into the question of its jurisdiction, may find *in favour* of the non-appearing State (as it did in the *Aegean Sea* case—see p. 103 above) and in consequence declare itself to be incompetent and decline to go into the merits, whereas under the system here advocated, the Court would (in all (B) type cases) automatically assume jurisdiction unless the defendant in the dispute appeared before it and objected in proper form; and failing that, the Court would proceed to the merits.

<sup>4</sup> *I.C.J. Reports*, 1949, at p. 248.

<sup>5</sup> *Ibid.*, 1980, at p. 9.



documents presented by the United States, a massive body of information from various sources, including numerous official statements of both Iranian and United States authorities. This information, the Court notes, is wholly concordant as to the main facts and has all been communicated to Iran without evoking any denial. The Court is accordingly satisfied that the allegations of fact on which the United States based its claim were well founded.<sup>1</sup>

The notion here involved has equally been criticized earlier.<sup>2</sup> *De facto*, and depending on circumstances, a tribunal may feel fully informed, but it cannot seriously be maintained that *de jure* it is so in the same way as it would have been if both parties had appeared and presented their respective cases, with argument and counter-argument. A moral conviction, however satisfying, of being fully informed, is not the same thing as the material certainty of it, and never can be.

Moreover—and this is a point of major importance—it must be asked what happens in a case where the Court is not, or is unable plausibly to think that it is, adequately informed? What happens to the application of Article 53 of the Statute<sup>3</sup> if the Court cannot feel 'satisfied', and the absence of satisfaction is due to the absence of information which the non-appearing State alone could have supplied? The logical implications of the Court's attitude is that in such circumstances the claim of the plaintiff State would have to be rejected. But what an injustice to that State and what a triumph for the non-appearing State!—for the further conclusion must be that, in theory at least, all that defendant States need do, in order to (in effect) win their cases before the Court, is not to appear, and also to withhold all information. The fact that in many—possibly most—cases the Court would in practice be in possession of information which it could plausibly regard as adequate, is not sufficient to dispose of the point of principle; and this strongly reinforces the remarks made by Professor O'Connell<sup>4</sup> about the 'uneasy' relationship between Article 53 and those articles of the Rules that provide for an orderly conduct of the procedure, leading to the paradox that while Article 53, by implication, requires that the Court be adequately informed, this can *ex hypothesi* never formally be achieved in the case of a default, although a default is precisely what that Article is supposed to provide for.

A redeeming feature of the *Hostages* case, however, was that the Court ignored the non-appearing State's objections on the score of jurisdiction and admissibility to the extent at least (and by contrast with its earlier practice) of not instituting a separate preliminary phase in order to consider these but, in effect, joining them to the phase of the merits,<sup>5</sup> to which it proceeded next, after the indication of interim measures of protection. But a joinder of the jurisdictional issues to the merits is not the

<sup>1</sup> *I.C.J. Reports*, 1980, at p. 18.

<sup>2</sup> p. 96 above.

<sup>3</sup> The terms of Article 53 are set out at p. 92 above.

<sup>4</sup> See No. 5 at p. 96 above, and see comment at pp. 96–7.

<sup>5</sup> See p. 113 n. 1 above, and that part of the text to which it relates.

same thing as a decision in favour of jurisdiction arrived at prior to the merits on the grounds indicated above.<sup>1</sup> This the Court did not do, and that was a pity—for the *Hostages* case afforded a classic example of a (B) class case,<sup>2</sup> since Iran was a party to no less than four instruments involving the Court's obligatory jurisdiction, and the Court found that of these

three, namely the Optional Protocols to the two Vienna Conventions of 1961 and 1963 on, respectively, Diplomatic and Consular Relations, and the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, do in fact provide such foundation—(i.e. for the exercise of the Court's jurisdiction).<sup>3</sup>

In other words the Court came to the right conclusion but on the wrong grounds. The grounds should have been that, Iran having in principle, and to all outward appearances, accepted the compulsory jurisdiction of the Court under certain instruments, the Court must assume jurisdiction unless Iran appeared before it to show why those instruments were not applicable in the circumstances of the case. Instead, the Court took Iran's objections into account but decided that they were mistaken in law, whereas (this being a class (B) case—which throws the onus on to the objector) it should have declared them, in effect, *irreceivable* in the absence of Iran to discharge that onus.

## V. SOME FINAL REFLECTIONS

My main conclusion has in effect already been stated above,<sup>4</sup> and is indeed in substance the one Professor O'Connell outlined in the penultimate paragraph of citation No. 4 above.<sup>5</sup> It is also one that I believe all true international lawyers would agree with in their hearts. Why then has a tribunal such as the International Court so signally ignored all the considerations that point to it?—so consistently overlooked or played-down the danger to the whole system of its obligatory jurisdiction<sup>6</sup> that this practice represents?—until a cloud no bigger than a man's hand hovering over the sub-arctic seas has spread to Europe, Asia Minor, the Middle East and Asia proper, and bids fair to become a quasi-permanent feature of the international legal sky, suffusing the system in such a way that while the outward shell of it remains intact—i.e. the mutual ostensible acceptances of the Court's compulsory jurisdiction—the core is washed away and replaced by what is no more than a variety of *forum prorogatum*—an invocation of the Court's jurisdiction on the one side, and

<sup>1</sup> At p. 113.

<sup>2</sup> See p. 113 above.

<sup>3</sup> Here I reflect the language of the Court's existing President, when writing about an analogous practice, though not one for which the Court as such was in any way responsible—see p. 105 above.

<sup>4</sup> p. 113.

<sup>5</sup> p. 96.

<sup>6</sup> See p. 106 above.

an acceptance (or not) on the other, at will. There is, however, this difference,<sup>1</sup> that in true cases of *forum prorogatum* such as those in the *Antarctic* and *Aerial Incident* categories,<sup>2</sup> which will by definition be of the class described above as class (A) cases,<sup>3</sup> where the Court's jurisdiction cannot be alleged to be founded on any pre-existing instrument of acceptance, the Court simply removes the case from its list without pronouncement as to jurisdiction, admissibility or merits, once it has become evident that the invitation is not going to be responded to; whereas in the class (B) type of cases, where the Court's jurisdiction can be, and is, invoked on the basis of such an instrument but meets with the 'non-appearance' riposte, the Court proceeds to deal with the matter and (at best for the non-appearing State) finds that it has no jurisdiction, or that the claim is inadmissible; or finds (at second best) *against* that State on jurisdiction and/or admissibility, but in its favour on the merits; or else (at worst) against it on merits also—an outcome which, however, the non-appearer can, with some pretence to plausibility,<sup>4</sup> maintain not to be binding on it, on the ground that it was never a party to the proceedings. Small wonder then that Professor O'Connell summarized the situation by saying in the *Aegean Sea* case<sup>5</sup> that where this practice is allowed to prevail, or at least not penalized in any way, 'there is no disadvantage to the respondent in failing to file regular pleadings and to appear. Indeed respondent States would seem to find it a positive advantage to boycott the proceedings.' He added, significantly, that if this was so, 'serious questions arise concerning the judicial function, and hence the role of the Court'—questions which the Court has so far treated with an insouciance amounting almost to levity.

The technical reasons which the Court itself has given in explanation, and attempted justification, of an attitude that has many puzzling features, have already been discussed and criticized. They revolve mainly round the Court's view of what the interpretation and application of Article 53 of the Statute<sup>6</sup> requires it to do. But, while this might account for the actual outcome of the various cases that have occurred, it cannot account for the Court's apparent complete lack of *concern* about a practice that strikes at the very foundations of its prestige and authority as a court of law, or for the perfunctory and pedestrian character of the language used by the Court when referring to it, or for the Court's seeming want of any sense of

<sup>1</sup> See p. 90 above.

<sup>2</sup> See, e.g., *I.C.J. Reports*, 1956, as stated at p. 90 n. 1 above. See also p. 113 n. 2 above.

<sup>3</sup> p. 113.

<sup>4</sup> See on this, p. 98 above, and n. 1. One thing the Court could do, which would go a considerable distance to taking the wind out of the sails of non-appearance, would be to declare that in all class (B) cases, the non-appearer is a party to the case and bound by the Court's decision, i.e. a party to the case in the sense in which Article 59 of the Court's Statute provides that 'the decision of the Court [in any case] has no binding force except between the parties [to the case] and in respect of that particular case'.

<sup>5</sup> See No. 3 at p. 95 above.

<sup>6</sup> Quoted at p. 92 above.



outrage such as has been felt by many onlookers—not least at the attitude of the Court itself, almost bordering on the self-satisfied.

Nor can technical considerations alone, connected with Article 53 of the Statute, account for the Court's failure to take any single step which—while not necessarily affecting the final outcome—might have given rise to some feeling of doubt and discomfort in the mind of the non-appearer—such as, for instance, a formal intimation from the Court that it could not take judicial cognizance of any communications objecting to its jurisdiction that were neither in the form, nor presented in the manner, prescribed by the Statute and Rules of Court. Instead, the Court has gone out of its way to set the minds of all prospective non-appearers at rest by proclaiming *expressis verbis* that it would, *proprio motu*, take account of all objections thus irregularly put forward, and of any others it could think up for itself; or in other words, it is as if it said to the non-appearer 'Don't worry, the Court will do all your work for you, and will see to it that your non-appearance does you no harm' (i.e. by reason of the non-appearance as such). To use a vivid French phrase: 'C'est bien le comble!' No wonder a practice that started with what appeared to be a special case, and was regarded as being in the nature of an isolated instance, has grown apace.

The Court's acceptance of this practice as merely 'to be regretted' but apparently not otherwise to be condemned—(to be *condoned* in fact, for that is the *mot juste* to describe the Court's attitude)—is not sufficiently accounted for by an interpretation of Article 53 of the Statute which (as has been seen) was not the inevitable one, nor even necessarily correct in the circumstances of these cases, and which no one except the non-appearing States themselves would have blamed the Court for rejecting.<sup>1</sup> Nor, on another level, can it be explained simply in terms of the Court's regard for the susceptibilities of States and governments—even defaulting ones—and its evident desire not to visit upon the defaulter the natural consequences of its default, even if this means (as it unquestionably does) that it is the *non*-defaulter who must suffer. Certainly the quality of the Court's mercy has never been strained in the direction of the defaulter upon whom, up till now, it has abundantly dropped 'as the gentle rain from heaven',<sup>2</sup> but has by no means been sent like the biblical rain, to fall equally upon 'the just and the unjust'.<sup>3</sup> How very apt in this context is the well-known parody

<sup>1</sup> I am all too guiltily conscious of the fact that in the only one of these cases in which I sat—the jurisdictional phase of the *Icelandic Fisheries* case—and although I raised my voice against the practice of non-appearance (see p. 109 above), I did not, in my individual remarks, react against the interpretation which, even then, the Court was putting on Article 53 (see pp. 107–8). Yet I can remember being uneasy over at least the necessity of that interpretation in the circumstances—a feeling that those particular and (then) almost unimaginable circumstances had never been contemplated when Article 53 was originally drafted, and that if they had, its wording would have been different or would have been qualified. It is easy to be wise after the event—harder at the time (and this was the first of these cases to occur)—but I believe that if I had remained longer on the Court for some of the later ones, my reaction over Article 53 would have been what it now is.

<sup>2</sup> *The Merchant of Venice*, Act IV, Sc. 1, 1, 184.

<sup>3</sup> Matthew 5: 45.

The rain it raineth on the just  
 And also on the unjust fellah,  
 But chiefly on the just because  
 The unjust steals the just's umbrellah!<sup>1</sup>

Verily has the umbrella of the Court's protection been stolen away from the non-defaulter in these cases—for, as Professor O'Connell said,

the protection which the Court gives to the respondent paradoxically erodes the protection which the applicant has under the Court's Rules. The greater the protection to the respondent the more progressive is the shift in the balance in its favour.<sup>2</sup>

It would, however, be idle to try and pinpoint the true causes of all this, even if one could make a not totally fallacious guess at what they might be. Rather do I want to mention in conclusion three considerations that might seem to afford justifications, and which I have known to be put forward as such, but which, in my view, should be totally rejected:

(i) *The Court should give effect to, or at least reflect, the prevailing tendency which is away from compulsory jurisdiction and in favour of jurisdiction exercised ad hoc by agreement or voluntary submission.*

(a) The premiss on which this nostrum is based is no doubt correct if one looks only at the existing international scene without regard to the future. But the tendency itself is retrograde and in sharp contrast with the considerable (forward-looking and enlightened) effort made by States between the two wars, and even in the period 1900–14, the aim of which was precisely to supersede the nineteenth-century system of *ad hoc* arbitral tribunals by setting up a standing international court<sup>3</sup> on a foundation which, while not involving anything like universal compulsory jurisdiction (though this was at one time suggested and seriously debated<sup>4</sup>), allowed for the voluntary acceptance of a full or partial measure of compulsory jurisdiction; but of course on the basis that although the acceptance itself would be voluntary, the resulting submissions to the jurisdiction in consequence of it would be obligatory within the terms of the acceptance. Otherwise, the acceptance would be pointless—as the practice of non-appearance makes it pointless now. The Court should be the last institution to encourage such a tendency even if only negatively by a process of toleration, and I shall come in a minute to the plea that there is nothing the Court can do about it.

<sup>1</sup> According to the *Oxford Dictionary of Quotations* this seems to have been attributed to Lord Bowen in Walter Sichel's *Sands of Time*.

<sup>2</sup> No. 4 at p. 95 above.

<sup>3</sup> This was of course the present Court's predecessor, the Permanent Court of International Justice. The Permanent Court of *Arbitration* (set up under the Hague Conventions of 1899 and 1900) had a standing secretariat or registry, fixed premises and a standing panel from which the parties could choose arbitrators for the given case, but was not otherwise a standing tribunal—for that implies a fixed, limited membership, a seat and constant availability of the same, regular, judges at the seat of the tribunal.

<sup>4</sup> For an excellent short account, see pp. 190–3 of Judge Manley Hudson's *The Permanent Court of International Justice* in the final, 1943, edition.

(b) The shift away from acceptance of compulsory jurisdiction (evidenced in the difficulty over the settlement of disputed clauses in modern multilateral conventions) is, in one of its principal aspects, a facet of the professed reluctance of many of the newer States, encouraged by older ones that have adopted systems of State-socialism, to regard traditional international law as binding upon them. Few of these States have accepted the Court's compulsory jurisdiction in any form, despite the fact that only a third of its membership is European/North American. However, *ex hypothesi* in their case, no problem of 'non-appearance' (which implies the existence of a *prima facie* obligation to appear) can arise. These States are necessarily—or at least the disputes in which they are involved will be—of the class (A) kind.

(c) The problem therefore arises exclusively in regard to those States—mostly though not entirely drawn from the category of older States—that have purported in principle to accept the Court's compulsory jurisdiction under some instrument or declaration having *prima facie* that effect, and therefore involving a *prima facie* obligation at least to appear and show cause *cur non*. These are class (B) cases. Now it may be understandable in a way if States having given such an acceptance find the onus of honouring it unduly heavy in some concrete case (and the motives of States in this regard have been fully explored earlier herein). But this is so to speak an occupational hazard of joining the acceptance group, and the risk has to be taken where it has not been possible to terminate the acceptance in time to avoid the concrete case. But on a long-term view, the only straightforward course for States who feel they may get into this sort of situation is either not to accept the Court's compulsory jurisdiction at all, or to withdraw or terminate their existing acceptances, or else amend these by attaching suitable conditions or qualifications. It is certainly not for the Court indirectly to encourage, or at least to fail to do all in its power to discourage, a process that leaves acceptances of its jurisdiction extant and ostensibly obligatory, but demotes them in practice to the level of the merely voluntary; and this leads to another sophistical plea, namely that:

(ii) It is *better that States should accept the Court's obligatory jurisdiction in principle (even if they do not always conform to it in concreto) than not accept it at all*—the concomitant being that the Court should not frighten States off by too rigid a view of the degree of obligation involved by any given acceptance, and should tolerate excusable or at least comprehensible lapses: the international morality of States is frail, it may be said, as human beings are also frail, and if the path of the willing State is made too difficult, it will be abandoned altogether; in short, an implied 'escape-clause' must be read into acceptances of the Court's jurisdiction so that—although these must not be repudiated as such, or openly violated—they can, with the Court's help (if not by way of connivance, then of condonation) be circumvented by the device of pleading such supposedly self-evident non-applicability as to justify the ostracism of the proceedings. But it is not



necessary to labour the point or do more than state the argument (with its strong smack of an inverted 'failed B.A.' plea, or again, of a resurrected form of the 'vital interests' exception) in order to bring out its specious character. It is a common delusion that evil may have to be done in order that good may come, and in exceptional and extreme cases this could be true, but no such compulsions exist in the present context, or should for one moment influence the attitude of the Court, nor lead it through over-attachment to the principle of consent or a misguided solicitude for the susceptibilities of governments, into tolerating a practice that is prejudicial to its dignity and to the cause the Court exists to serve. But here I reach the third supposed justification:

(iii) *There is nothing the Court can do about it.* The Court cannot force the defendant State to appear, so the argument runs; it cannot coerce it into presenting its case in proper form, or prevent it doing so by unorthodox means that cause the Court, willy nilly, to become aware of the nature and ground of the State's objections. Finally, it is said, Article 53 of the Court's Statute obliges it to take account of these objections, however presented, and to give effect to them if valid. All this is true up to a point and in a certain sense, but not further or otherwise, as I hope the previous pages have shown. Here, in recapitulation and summary, is what the Court can do:

(1) First and foremost, draw the clear distinction between class (A) and class (B) cases indicated above<sup>1</sup>—the distinction between cases in which there is not even a *prima facie* acceptance of jurisdiction or obligation to appear at all, and those cases where, *prima facie*, there is. This is a distinction easy to make and which the Court impliedly makes every time it removes a case from its list because, since its jurisdiction depends on the *ad hoc* consent of the impugned State in the absence of any *prima facie* instrumental basis of jurisdiction, it has become evident that such consent is not going to be forthcoming.

(2) Regard all class (B) cases (i.e. those where such a possible instrumental basis does exist) as cases in which there is a *prima facie* presumption that the Court has jurisdiction, so that the onus of rebuttal lies on the impugned State, which must for that purpose make use of the 'preliminary objection' processes prescribed by the Statute and Rules of Court.

(3) In the absence of objection thus presented—or in the event of objection presented only by unorthodox means—and after all necessary warnings, and the grant of reasonable time-limits to the impugned State—the Court can forthwith declare itself competent and proceed to the merits. The only formal objection I can see to this course arises from the one word 'satisfy' in Article 53 of the Statute: the Court must 'satisfy itself . . . that it has jurisdiction'. But it is surely for the Court to decide what is going to satisfy it (this indeed is precisely the point the Court itself made in

<sup>1</sup> p. 113.

its citation from the *Corfu* case<sup>1</sup>), and although this would not justify any arbitrary or capricious determination that ignored obvious facts or relevant considerations, it would in my view be perfectly proper for the Court to declare itself satisfied on the basis (a) of an instrument apparently valid and in force, purporting to confer jurisdiction upon it (for which its jurisprudence over the indication of interim measures of protection affords ample precedent<sup>2</sup>); (b) full opportunity for the impugned State to make objection; and (c) failure to do so by the receivable means, viz. those prescribed by the Statute and Rules. If any reinforcement of this view were needed, it could be found by holding that in such circumstances the impugned State must be deemed to have conceded the jurisdictional point through not disputing it by the only method the Court, consistently with its Rules, can recognize.

(4) In any case of serious doubt as to the propriety, in the particular circumstances, of proceeding as described in (3) above, automatically join all preliminary issues to the merits without allowing any preliminary phase. Although the deterrent effect would not be as great, it would still be considerable—for one of the objects of the non-appearer is to avoid all possibility of any examination of the merits—an object it might well achieve if it appeared and, in a preliminary phase, persuaded the Court then and there to decline jurisdiction or pronounce the claim inadmissible. Why not compel it to do so if it wants to achieve that object?

(5) Declare the impugned State, for the purposes of Article 59 of the Statute, to be a 'party' in, and to, any proceedings brought against it by virtue of an instrument under which it has purported to accept the Court's jurisdiction, unless it appears before the Court to show cause why the instrument is invalid, no longer in force, or not applicable to the circumstances of the case. This would immediately remove the non-appearer's sheet-anchor, viz. that by virtue of its non-appearance it can maintain that it is not a party to the proceedings and consequently not bound by the judgment of the Court.

(6) Finally (but this is perhaps too much to expect!), throughout the proceedings resolve all border-line questions or questions of serious doubt in favour of the complainant State, unless the State impugned appears to show cause why not, and in proper form.

To follow a settled course on the above lines might not eradicate the practice of non-appearance: it should go far to deter it, or at least to render it of little point juridically. It would also help to redress the balance at present heavily tilted in favour of the non-appearer, and to restore to the complainant some measure of the equality of arms at present lacking because of the handicaps in the presentation of its case which the non-appearance and unorthodox procedure of the other party creates.

<sup>1</sup> See p. 113 above.

<sup>2</sup> See pp. 93 and 110 above.

Last, but not least, the Court, by doing all that lay within its power to discourage and draw the teeth of non-appearance, would have ceased to lay itself open to the justified reproach of treating casually a practice that constitutes a blot on the administration of international justice and on its own authority and repute.



# THE FIRST 'WORLD BANK' ARBITRATION (*HOLIDAY INNS v. MOROCCO*)—SOME LEGAL PROBLEMS\*

By PIERRE LALIVE<sup>1</sup>

## I. INTRODUCTION

ON 13 January 1972 the International Centre for the Settlement of Investment Disputes (I.C.S.I.D.) in Washington registered<sup>2</sup> the first request for arbitration ever to be submitted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, of 18 March 1965 (sometimes called the Washington Convention or 'World Bank Convention').<sup>3</sup> This registration, effected in accordance with Article 36 (3) of the Convention and Rule 6 (1) (a) of the Rules of Procedure for the institution of conciliation and arbitration proceedings ('Institution Rules') followed a request for arbitration, of 22 December 1971, submitted jointly as 'requesting party' by the Swiss corporation Holiday Inns S.A., Glarus, and the American corporation Occidental Petroleum Corporation (O.P.C.). According to the terms of the request, the two companies were acting 'in their own name and in the name and on behalf of' several other companies—a fact which, as will presently be shown, was to give rise to a number of difficulties, objections and decisions in the course of the arbitration proceedings.

About six years later, in the course of the summer of 1978, the parties (the Holiday Inns—Occidental Group and the Moroccan Government) reached an amicable settlement and the case was accordingly withdrawn by joint request.<sup>4</sup> This outcome, let it be said in passing, far from reflecting

\* © Professor Pierre Lalive, 1981.

<sup>1</sup> Arthur Goodhart Professor in Legal Science and Fellow of King's College, Cambridge (1978–9); Professor of Law, Geneva University and Graduate Institute of International Studies; Attorney-at-law; Member of the Institut de Droit International.

<sup>2</sup> Under the reference ARB/72/1.

<sup>3</sup> On this subject see, for instance, the following books and articles: M. Amadio, *Le Contentieux international de l'investissement privé et la Convention de la Banque Mondiale* (Paris, 1967); A. Broches, *Recueil des cours*, 136 (1972–II), pp. 331–410, and *Columbia Transnational Law Journal*, 5 (1966), pp. 263–80; J. Cherian, *Investment Contracts and Arbitration, the World Bank Convention* (Leyden, 1975); Delaume, *International Lawyer*, 1 (1966–7), pp. 64–80, and *Transnational Contracts* (1979), vol. 2, ch. XIV, § 14, pp. 9–22; P. Reuter, R. Kovar, L. Siorat, P. Lalive, B. Goldman and A. Broches, *Investissements étrangers et arbitrage entre États et personnes privées; la Convention BIRD* (Dijon–Paris, 1969); P. Kahn, *Indian Law Journal*, 44 (1968), pp. 1–32; E. Lauterpacht, *Recueil d'Études en hommage à P. Guggenheim* (Geneva, 1968), pp. 642–64; M. Moore, *Stanford Law Review*, 18 (1966), pp. 1359–80; J. Pirrung, *Die Schiedsgerichtsbarkeit nach dem Weltbank-übereinkommen für Investitionsstreitigkeiten* (Berlin, 1972).

<sup>4</sup> On 17 October 1978 the Tribunal rendered a procedural order noting the discontinuance of the proceedings: *I.C.S.I.D. Thirteenth Annual Report* (1978/9), p. 5.

some inherent weakness of the arbitration process, would seem to be in the nature of things; it illustrates one of the advantages, often little known or underestimated, of international arbitration, which normally enables the parties to obtain, in the course of time, a clearer perception of the merits and demerits of their respective cases and arguments. A psychological change thus often takes place in the course of the many months, or years, of litigation and this change, together with a certain weariness brought about by protracted debates and arguments and the passing of time, may well—though it does not of course necessarily have this effect—facilitate an amicable settlement.

It should perhaps be mentioned that the proceedings did *not* in fact last five and a half years, as a simple comparison of dates might lead one to gather. Much of the time which elapsed between the beginning of 1972 and December 1978 was used in direct negotiations between the parties. Moreover, the procedure had to be suspended for nearly a year, in 1976 and 1977, following the resignation and the death, respectively, of two of the original three arbitrators.

Apart from these circumstances—which, while not entirely unusual, are fortunately not found in the majority of arbitration cases—it would be naïve to imagine that a dispute of the nature and complexity of the so-called *Holiday Inns* case could have been argued and decided in a matter of months. On each side a vast quantity of information and documents had to be collected, analysed and explained, together with a large number and variety of legal issues related both to procedure and to the merits. The considerable amount of work involved, for the parties and their counsel, as well as for the arbitrators, is also indicated by the fact that, following in most cases extensive written and oral arguments by both sides, the Arbitration Tribunal rendered, between 1972 and 1977, no less than eight decisions on important questions of law, concerning I.C.S.I.D. and its own jurisdiction, the position of the parties and several questions of substance, mainly of interpretation of the contracts.

While the amicable solution of any international dispute must of course be welcomed by all, lawyers may be tempted selfishly to regret it, on the ground that the publication of arbitral decisions, preferably together with the arguments of the parties, would have substantially enriched and contributed to the progress of international law in the field of investments and, in particular, of the law of international arbitration. The prevention of international investment disputes would not be served, it is submitted, if nothing were known of the legal issues debated, and sometimes solved, in litigation of such importance. States and investors alike, their advisers and the legal community in general need to be better informed of the problems and obstacles involved in the application, in a concrete case, of the Washington Convention of 1965 and of the I.C.S.I.D. Arbitration Rules. What may be called, for short, the 'I.C.S.I.D. arbitration system' will only be resorted to in the future if it is better known, and known to

function in a satisfactory manner—provided of course the users possess the necessary skill required by the drafting of international contracts and by the conduct of international arbitration.

No attempt will be made here to give a full account of the many interesting issues, of facts or of law, procedural and substantive, which arose in the course of the first 'World Bank Arbitration'. A selection of legal problems will be presented and analysed, and it is hoped that such a presentation, however limited, may help future users of the Washington Convention of 1965 and contribute, to some extent, to a better understanding of one of the most remarkable efforts of recent times to offer individuals international guarantees against irregular measures taken by foreign States while limiting simultaneously the possibility of diplomatic protection as against these States.<sup>1</sup>

Some knowledge of the facts leading to the dispute is of course indispensable here, as the legal issues would hardly be comprehensible without them. The present study will not, however, enter in any detail into the merits of the dispute and nothing, in the following summary of the facts, should be construed as implying any judgment on the respective attitudes, acts or omissions of the parties. To try to ascribe responsibilities, in a complex case concluded by an amicable settlement, would appear a particularly futile pursuit. Moreover, in most litigation arising from the performance, over the years, of an international contract—especially between a State or State agency and a foreign investor or corporation—a variety of factors and circumstances do contribute to a worsening of the relationship between the parties, after the first 'honeymoon' period of co-operation. In the 'transnational' relations involving corporations of the industrialized world and a developing State, many political or psychological difficulties are bound to arise, and they may be substantially increased by 'legal factors', such as imperfections of drafting and the ambiguity of contractual provisions.

While the *Holiday Inns* case does seem to illustrate the remarks just made and could be the object of an interesting study in 'conflict' or 'conflict avoidance', it will not be presented here from this particular angle, except perhaps in passing. But the analysis of legal issues should also, or so it is believed, provide food for thought and some valuable lessons for students and practitioners alike of what may be described as the 'preventive' international law of 'State contracts'.

## II. THE FACTS

Rather more than a sketchy outline of the facts is indispensable for a proper understanding of the legal points to be discussed. In 1966 the Government of Morocco, anxious to develop and diversify the country's

<sup>1</sup> As noted by P. Reuter, loc. cit. above (p. 123 n. 1), p. 11, this aspect—of a protection offered to investors—is obviously predominant in the Convention. Cf. also E. Lauterpacht, loc. cit. above (p. 123 n. 1), p. 643 and *passim*.



hotel industry, asked the Occidental Petroleum Corporation (O.P.C.) to establish contact with a first-rate American group in that field, which could contribute to tourist development through its experience, organization and know-how. Following this initiative, contact was indeed made with the well-known American group Holiday Inns (H.I.), whose representatives visited Morocco. Detailed conversations took place between H.I. and O.P.C., on the one hand, and the Government (represented by the Minister of Finance) on the other, and technical and financial studies were made—including a 'feasibility study' by an independent Moroccan consulting firm, O.T.M.,<sup>1</sup> in order to ascertain the possibility, modalities and cost of the construction of four 'Holiday Inns' hotels. The Government's intention was to fill in a gap in the hotel equipment of the country by adding, to the few existing traditional luxury class hotels,<sup>2</sup> other hotels more adapted to the needs of modern organized tourism and group travel. The H.I. group was expected to use the standardization and rationalization of services and other methods which it had used with conspicuous success in the United States and elsewhere.

On the basis of those negotiations and preliminary studies, the Government came to the conclusion that the H.I. project could hardly be beaten from an economic point of view<sup>3</sup> and would be of considerable interest for Moroccan tourism.<sup>4</sup> A first agreement or 'letter of intent' was thus signed by the parties, on 28 September 1966, in the Moroccan Embassy in Washington D.C.<sup>5</sup> It was followed by further negotiations and, on 5 December 1966, by the execution in Morocco of a final contract, the so-called 'Basic Agreement'—which, as is often the case in the realization of projects of that magnitude, was to be supplemented over the years by several additional agreements.

By the 'Basic Agreement', the parties entered into a joint venture whose purpose was the establishment and operation in Morocco of four H.I. hotels of 300 rooms each, namely in Rabat, Marrakesh, Fez and Tangiers. The main obligations of the respective parties may be summarized as follows:

'In order to induce' H.I. and O.P.C. to build the four hotels, the Moroccan Government undertook to lend them a number of millions of U.S. dollars per hotel in the form of a first mortgage loan through specialized Moroccan agencies, and to grant them further incentives, such as a 'bonus', foreign exchange transfer facilities, duties exemptions and other tax benefits, as well as assistance 'in the acquisition of suitable grounds at the lowest possible prices'.

<sup>1</sup> Omnium Technique Maroc. Its favourable report was submitted to the Government three months before the signing of the 'Basic Agreement' of 5 December 1966.

<sup>2</sup> Two of them had recently been built, at considerable cost, with exclusive Government financing.

<sup>3</sup> Terms used by the consulting firm O.T.M. in its above-mentioned report.

<sup>4</sup> One contemplated advantage of the Project was the integration of the four hotels within the world-wide H.I. chain and its referral or reservation system.

<sup>5</sup> By M. Tahiri, Minister of Finance, for Morocco, Mr. K. Wilson, for H.I., and Dr. A. Hammer, for O.P.C.

On their part the two American partners undertook to carry out the 'Project', i.e. to plan, build, equip and operate the four H.I. hotels, which were to become their property, and in a first stage to construct them, in accordance with plans and specifications, of a quality corresponding to the 'five-star category'. The 'value' of each hotel was conventionally fixed at a certain figure 'regardless of the cost of construction', a figure 60 per cent of which was represented by the agreed loan. The non-Moroccan partners to the joint venture took upon themselves, as borrowers, to reimburse the Moroccan lenders the principal and interests of the loans. On top of 'real' liability instituted through mortgages, a personal guarantee was expressly stipulated, so that the Government was, so to speak, doubly certain that the loans would be repaid and the Project completed. Even more important, perhaps, was the stipulation that Holiday Inns of America and O.P.C. would be 'fully and jointly responsible' for any construction moneys required in excess of the conventional figure representing the 'value of each building'.<sup>1</sup> In other words, the builders had to use their organization, skill and know-how in order to fulfill certain specifications as to quality with the financing provided by the Government and, if need be, with additional financing of their own.

As is frequently the case in such international ventures, the private partners had to ask themselves what was the most suitable organization for the performance of the 'Moroccan Project', and to establish a convenient corporate structure, taking into account, in particular, general business and tax (mainly U.S.) considerations together with technical and administrative factors. This explains the insertion into the contract of a provision (Article 13) reserving the right of the foreign partners to assign at any time 'to any affiliated corporation they may jointly own or designate' or 'to separate corporations or affiliates' their rights and duties under the contract.

Eventually the two American partners chose as the best solution the creation of separate, rather than jointly owned, affiliated companies, each of them 100 per cent controlled: one took the form of a Swiss subsidiary, Holiday Inns S.A., Glarus, while the other, Occidental Hotels of Morocco (O.H.M.), was created, at a somewhat later date, as an American subsidiary of O.P.C.<sup>2</sup>

As for the Government, it was not concerned with the internal business organization of its contracting parties, but it had a direct and obvious interest in preventing a particular corporate structure from being used to its disadvantage and affecting the balance of rights and duties previously agreed. With this end in view, the Government requested and obtained the

<sup>1</sup> Letter of intent and Article 4 of Basic Agreement. As shown below, the interpretation of the contract on this point proved to be a major bone of contention between the parties; cf. also the decision of the Arbitral Tribunal of 23 September 1974, mentioned below.

<sup>2</sup> Hence the fact that O.H.M.'s name does not appear in the Basic Agreement, where it is only referred to as 'a subsidiary of O.P.C.'. On the objections raised by the Government regarding O.H.M. during the proceedings, see below, p. 147 n. 1.

signing, on the same day as the Basic Agreement of 5 December 1966, of a 'letter of guarantee', whereby the two American groups, H.I. and O.P.C., undertook:

to assume all responsibilities of guarantors to warrant all commitments and liabilities and the true and complete fulfilment of all obligations

which the signatories to the Basic Agreement had entered or would enter into.

It should perhaps be stressed here that the signatories were formally (1) Holiday Inns S.A., Glarus, Switzerland and (2) 'a subsidiary of O.P.C.' and that, on the date of execution of the Agreement, the former was only in the process of creation,<sup>1</sup> while the second was clearly not in existence. The Government was (or should have been) fully aware of this situation, and signed the Agreement without objecting—content as it was with the 'letter of guarantee' and with the fact that, for all practical purposes, it was dealing with two powerful American groups. Some six years later,<sup>2</sup> however, as will be seen, it relied on this formal position to object to I.C.S.I.D. jurisdiction and to the seisin of the Arbitration Tribunal.

A last and important element of the contract must be mentioned at this stage, that is, its arbitration clause. Contrary to a provision contained in the 'letter of intent' of 28 September 1966, Article 14 of the Basic Agreement did not provide for arbitration under the Rules of the International Chamber of Commerce, but referred expressly to the (then very recent) Washington Convention of 18 March 1965 for the settlement of investment disputes. The clause specified, moreover, perhaps in connection with the Washington seat of I.C.S.I.D. and the American nationality of one of the parties, that the 'forum of jurisdiction' should be outside the country of the parties.

### III. THE DISPUTE

It stands to reason that international projects such as the one under review offer many occasions for conflicts—especially when the performance of the contract necessarily calls, over the years, for a variety of additional agreements and decisions at different levels. A great deal obviously depends on the individuals concerned, on their personal relationship, on the continuity, or absence thereof, of mutual trust and will to co-operate. Within large and complex organizations, a permanent problem (and a source of considerable potential conflicts) appears to be one of 'communication': it is hardly surprising therefore that, for instance, the common intentions of the signatories to the Basic Agreement should have received different interpretations by people 'in the field', engineers, builders, local administrators and State officials. The difficulties are increased in the case of a 'transnational' relationship. The methods of

<sup>1</sup> It was eventually registered in Glarus, Switzerland, on 1 February 1967.

<sup>2</sup> In a counter-memorial submitted on 15 December 1972 to the Arbitration Tribunal.



American industrial corporations, experienced and successful though they may be in some countries, may not work, or not in the same way, in the context of a developing country and, in Morocco, having regard to the characteristics and traditions of the local administration.

To these general circumstances and sources of possible conflict was added, in spring 1971, a fact which—or so it was contended by the claimants—played a decisive and negative role: important political changes took place in Morocco, and the main promoters of the Project were replaced by other ministers, who seemed to have taken a different view of the Basic Agreement as a whole and a critical view of their predecessors' wisdom in negotiating it. They appeared determined to obtain, if not the complete substitution of the Basic Agreement by a 'new deal', at least its interpretation or modification in a manner much more advantageous to Morocco and correspondingly more onerous to the foreign partners. In such a change of political climate, the 'normal' or usual difficulties encountered by foreign investors and contractors in developing countries were bound to be substantially increased.

From a legal viewpoint, one may also conjecture, being wise after the event, that somewhat clearer provisions in the contract might well have prevented some at least of the misunderstandings and conflicting interpretations which were to culminate in a rupture of relations. In fairness to the lawyers concerned, on both sides, it may be recalled that top negotiators, whether acting for governments or for multinationals, have frequently little interest in or little patience with legal niceties; they are apt to limit the task of their legal staff to one of 'putting into form' the bargain which has been struck by superior minds!<sup>1</sup>

Be this as it may, a plurality of causes appears to have brought about a steady deterioration of the relations between the parties. The first difficulties led to partial renegotiation of specific points and to the signing of other and subsidiary agreements, sometimes after considerable bargaining (e.g. in the case of an additional agreement of 14 June 1968).

The acquisition of building sites, for instance, proved a source of great difficulty for the foreign investors: in order to obtain the assistance they had hoped for under the contract from the Government, they had to assign to the latter, free of cost, a 49 per cent interest in each of the hotels, either directly or by the transfer, in due course,<sup>2</sup> of 49 per cent of the shares of four local companies, which were created as wholly owned subsidiaries of H.I., under the name of H.I.S.A. Casablanca, H.I.S.A. Marrakesh, etc.

It should be noted here that, while the creation of these four local subsidiaries was a necessary technical device resulting from the Government's wish to obtain a quid pro quo for its assistance, through a new loan, in the purchase of the building sites, it was to prove eventually a source of

<sup>1</sup> This should be distinguished from the attitude of negotiators who, while entirely aware of the imperfect drafting of an agreement, nevertheless accept the legal risks involved on the ground of prevailing commercial or political considerations.

<sup>2</sup> i.e. after the completion of each hotel.

serious, mainly procedural, difficulties in the arbitration—as will be shown below and as should be readily perceived by any reader of Article 25 of the Washington Convention.

Other difficulties arose, for instance, in connection with questions of foreign exchange, of tax claims made notwithstanding the Basic Agreement by the Moroccan authorities, of further work needed to adapt plans and specifications to the 'five-star category' requirements of the Ministry of Tourism, etc. They led to the signing of further additional agreements in September and October 1970. But the main root of dissension was to be the contractual provision relating to the financing of the Project.

Under the contract, loan payments had to be made through a Moroccan specialized agency, the 'Crédit immobilier et hôtelier' (the C.I.H.) on a monthly basis, according to construction progress as established by 'construction draws' and within seven days from presentation.<sup>1</sup> The modalities were stipulated in separate contracts concluded, on the local level, by the C.I.H. with each of the H.I.S.A. companies.<sup>2</sup> An important fact to bear in mind is that this system of financing was the basis of the exchange control authorizations needed by the builders to purchase material and equipment out of Morocco.

To cut a long story short, the many difficulties met by the builders in their day-to-day co-operation with various local authorities and bodies (C.I.H., Ministry of Tourism, customs or exchange control officials, etc.) increased over the years. Long and unexplained delays occurred in the payment of construction draws and bonuses and in the delivery of necessary authorizations, until, in the middle of May 1971, the C.I.H., acting presumably on Government instructions, stopped payment altogether. Meanwhile, the construction of two of the four hotels had been completed<sup>3</sup> and, for the remaining two Holiday Inns, was well advanced. The cessation of the payments due under the Basic Agreement with the Government and the loan contracts with the C.I.H., together with the refusal of foreign exchange and other administrative authorizations,<sup>4</sup> was a serious blow to the foreign builders. Short of adequate financing and of indispensable foreign currency, and confronted with numerous other obstacles, the Holiday group could no longer pay local suppliers and sub-contractors and felt compelled either to stop construction or to provide financing out of its own pocket, contrary in its view to the Basic Agreement. On their side, the Moroccan authorities appear to have felt that the Agreement had to be interpreted as implying a simultaneous

<sup>1</sup> Therefore 90 per cent of the loan should have been paid out to the builders upon completion of each hotel, the 10 per cent remaining being held for some time as a guarantee.

<sup>2</sup> The first of the loan contracts with the C.I.H. was in fact signed in September 1968 by H.I., Glarus, which was the owner of the land. On the 'dual nature' of these contracts, see the Tribunal's decision of 23 September 1974, no. 2, discussed below.

<sup>3</sup> In September 1969 and March 1971 for H.I. Marrakesh and H.I. Fez respectively.

<sup>4</sup> e.g. the refusal by the Government of a draft management contract to be concluded between Holiday Inns as manager, and H.I.S.A. Marrakesh as owner, for the operation of the hotel in Marrakesh. The Government had been informed as a matter of courtesy; as at best a minority shareholder in H.I.S.A. Marrakesh, it was not to be a party to the management contract (which followed the standard pattern used within the H.I. Group).

personal financial contribution from the builders or, if not, that it was inequitable and should be renegotiated.

A genuine misunderstanding may well have existed as to the economics of the Project and the correct interpretation of the contract. In the claimants' view the whole Project could and should be performed, thanks to H.I. rationalization and special expertise, with Government financing alone. A crisis developed when it was realized on the Moroccan side that the construction was actually proceeding without additional funds from abroad. It can only be said here, in brief, that no clause in the Agreement did expressly provide for such additional funding, as was clearly recognized by the Arbitration Tribunal in a decision of 23 September 1974 on the 'existence and scope of certain liabilities of the Parties deriving from their contractual relations'.

Composed at the time of Mr. Sture Petré, President, Sir John Foster and Professor Paul Reuter,<sup>1</sup> the Tribunal noted that the problem of financing was 'the most controversial between the Parties'. It found in substance that the Agreement did *not* 'institute a direct and autonomous investment' obligation on the part of the plaintiffs but 'a guarantee of quality to the benefit of the Moroccan State that could possibly lead to a liability to invest funds of their own' (i.e. if Government financing proved insufficient to enable the plaintiffs to build hotels corresponding in quality to the conventional or theoretical 'value' agreed). In retrospect, one may wonder if the dispute would not have been prevented, or its length reduced, if the Agreement had not been, in the Tribunal's own words, 'distinguished by its laconism' on this essential point.

All attempts at conciliation having failed, in spite of negotiations at the highest level, the builders interrupted, in August 1971, the construction of the two Holiday Inns of Casablanca and Tangiers. Negotiations continued, however, but in vain until, on 22 December 1971, the claimants filed their 'request for arbitration'. In the request, the claimants described the dispute as 'a legal dispute arising directly out of an investment within the meaning of Article 25 (1)' of the Washington Convention and in particular as relating to (a) the obligation of the Moroccan Government and its agent to resume their loan payments and bonus payments, (b) the compensation due for damages and losses incurred by reason of discontinuance or delays of such payments and (c) the convertibility and transfer of foreign currency used for construction, and of management fees, franchise fees and other compensations for expenses incurred in connection with the establishment and operation of the hotels.

At a later date, a counter-claim, perhaps inevitably,<sup>2</sup> was lodged by the

<sup>1</sup> The latter two arbitrators having been designated respectively by H.I.-O.P.C. and by the Moroccan Government.

<sup>2</sup> This had been foreseen, in April 1968, by Professor Reuter, who was to become arbitrator in 1972, when he wrote (*loc. cit.* above (p. 123 n. 3), p. 7): '... on peut être à peu près certain d'un point de vue de tactique procédurale que le jour où un particulier mettrait en marche la protection prévue dans la Convention, et déclencherait par exemple un arbitrage, l'État attaqué présenterait immédiatement une demande reconventionnelle.'



Moroccan Government, under a variety of forms, alleging breaches by the H.I. group of its obligations, e.g. to provide investment of its own, as stated above, or to meet the quality specifications required by Moroccan legislation. What should be noted here—without entering further into the merits of the dispute—is that neither the Government, at least at that stage of the arbitration proceedings, nor the H.I. group, disputed the validity and continuing existence of the Basic Agreement and additional contracts between the parties.

Such are—in a necessarily simplified, but, one hopes, balanced<sup>1</sup> outline—the facts of the case, and these facts should obviously be kept in mind for a proper understanding of the following discussion of legal issues.

#### IV. THE QUESTION OF PROVISIONAL MEASURES

An important practical problem in many international arbitrations, for rather evident reasons, is that of provisional measures or, as they are sometimes called, 'interim measures of protection'.<sup>2</sup>

In commercial arbitration, the general rule appears to be that arbitrators have no power to order provisional measures, which must be requested from ordinary, i.e. State, courts.<sup>3</sup> An arbitration tribunal can do no more, even in case of prior agreement of the parties, than recommend certain acts or abstentions, and draw certain consequences from the compliance, or lack thereof, of the parties. In settlement of disputes under public international law, the matter is largely regulated by specific provisions, at least when 'institutional' tribunals and not *ad hoc* arbitrations are concerned. A well-known example is Article 41 of the Statute of the International Court of Justice.<sup>4</sup>

The magnitude and complexity of most international disputes, involving inescapably long periods of time before any decision or amicable

<sup>1</sup> Notwithstanding the fact that the present writer was personally involved in the arbitration, as chief counsel for the claimants.

<sup>2</sup> On this question, see, e.g., A. Masood, 'Provisional Measures of Protection in Arbitration under the World Bank Convention', *Delhi Law Review*, vol. 1 (1972). See also Article 47 of the Washington Convention, quoted later in the text, and Rule 69 of the I.C.S.I.D. Arbitration Rules.

<sup>3</sup> See, e.g., Article 26 of the Swiss 'Concordat' on arbitration: '1. The public judicial authorities alone have jurisdiction to make provisional orders. 2. However, the parties may voluntarily submit to provisional orders proposed by the arbitral tribunal.' Cf., for Eastern Europe, the example of the Rules of the Arbitration Court of the Czechoslovakian Chamber of Commerce, section 18.

<sup>4</sup> Cf. also Article 48 of the Statute and Article 66 of the Rules of Court, and R. Y. Jennings, Report in Mosler and Bernhardt (eds.), *Judicial Settlement of International Disputes—An International Symposium*, Max Planck Institute, Heidelberg, 1972 (1974), p. 35, at p. 44; S. Rosenne, *The Law and Practice of the International Court* (Leyden, 2nd edn., 1965), no. 138; J. C. Witenberg, *L'Organisation judiciaire, la Procédure et la Sentence internationales* (Paris, 1937), pp. 387–94; M. H. Mendelson, 'Interim Measures of Protection in Cases of Contested Jurisdiction', this *Year Book*, 46 (1972–3), pp. 259–322; B. A. Wortley, 'Interim Reflections on Procedures for Interim Measures of Protection in the I.C.J.', in *Il Processo internazionale, Studi in onore di G. Morelli* (1975), pp. 1009–19. Other examples are found in Article 33 of the 1928 General Act for the Pacific Settlement of International Disputes, and in Sections 53–7 of the Rules of Procedure of the Arbitral Commission on Property, Rights and Interests in Germany.

settlement can be reached, give the question of provisional measures considerable significance.<sup>1</sup>

The drafters of the Washington Convention, aware of this practical need, provided in Article 47 that:

Except as the parties otherwise agree, the tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

A large measure of discretion is granted here, as usual, to the arbitration tribunal,<sup>2</sup> who will naturally be inclined, when exercising it, to follow the principles developed in international cases. It is, therefore, of some general interest to outline here how the first Arbitral Tribunal created under the Washington Convention approached and solved the question of provisional measures, when requested to intervene by the claimants, shortly after its own constitution.<sup>3</sup>

The request for provisional measures of 12 May 1972 was based on the following facts, which were, broadly speaking, undisputed: with regard to the two hotels of Casablanca and Tangiers, the building of which had been interrupted in the circumstances related above, the Moroccan Government had taken steps, in February 1972 and the following months, perhaps understandably, in order to have architects appointed, take over the site and complete the construction of the hotels. Although the I.C.S.I.D. arbitration was already pending,<sup>4</sup> the Government did not file any request for provisional measures with the Arbitration Tribunal, but turned to the Moroccan courts.<sup>5</sup> Whether this was due to an oversight or based on the opinion that the Arbitration Tribunal could not act, or would not respond in a practically satisfactory manner, is not known. What is likely is that—as will become apparent below when discussing preliminary objections to jurisdiction—the Moroccan local authorities failed to perceive, or to attach any importance to, the international dimension of

<sup>1</sup> This significance appears to be increasing: while the P.C.I.J. received six requests, the I.C.J. has so far received requests in eight cases, of which the better known are doubtless the *Anglo-Iranian Oil Co.* (I.C.J. Reports, 1951, p. 89) and *Interhandel* (I.C.J. Reports, 1957, p. 105) cases, and the most recent ones are the *Nuclear Tests* cases (I.C.J. Reports, 1973, pp. 99 and 135), the *Trial of Pakistani Prisoners of War* (I.C.J. Reports, 1973, p. 328), the *Aegean Sea Continental Shelf* (I.C.J. Reports, 1976, p. 3) and the recent *Case concerning U.S. Diplomatic and Consular Staff in Teheran* (Order of 15 December 1979). On this trend, see Judge Elias, 'La C.I.J. et l'indication de mesures conservatoires', in *Conférence commémorative G. Amado, Nations Unies, Genève, Octobre 1978*, pp. 3-18.

<sup>2</sup> Notwithstanding the useful provisions contained in Rule 39 of the I.C.S.I.D. 'Arbitration Rules' and its accompanying Notes. It may be mentioned in passing that these 'Notes', while possessing no official value, are bound to influence the arbitrators to some extent.

<sup>3</sup> An oral request was made, during the very first session of the Tribunal, held in The Hague on 20 April 1972, by counsel for the claimants, who was invited by the Tribunal to make a written submission—which was done on 12 May. The defendant failed to reply in writing; but the matter was fully argued orally on 1 July 1972 (at the Paris office of the World Bank) and the Tribunal gave its decision on the following day.

<sup>4</sup> Since the registration by the I.C.S.I.D., on 13 January 1972, of the claimants' request for arbitration, dated 22 December 1971. Cf. Rule 6 of the I.C.S.I.D. 'Institution Rules'.

<sup>5</sup> Under the summary procedure known in France and Morocco as *référé*; more precisely, the C.I.H. lodged a unilateral request in February and the Ministry of Finance a similar one in March, with the Tribunal and the Regional Court of Casablanca, respectively. They obtained orders entitling them to take all necessary measures to have construction resumed and completed at H.I. costs. For technical reasons, which need not be detailed here, the H.I. Group was only informed afterwards.

the dispute and were thinking only in terms of relations between the C.I.H. and the respective 'H.I.S.A. company'.

As for the two completed hotels of Marrakesh and Fez, somewhat similar local, and unilateral, procedures took place, but the situation was different: the Government's refusal to approve the management contract needed for operating the hotels<sup>1</sup> had led the foreign group, following the breakdown of negotiations, to threaten the closure of the hotels. To prevent this the Moroccan authorities requested, in January 1972, and obtained from the local court, the appointment of a 'judicial administrator'.<sup>2</sup>

In the claimants' view, the unilateral measures taken by the Government or obtained by it from its own courts were not only a violation of their contractual rights under the Basic Agreement (e.g. the rights to build the hotels according to their own specifications and methods, and the rights to operate them as Holiday Inns),<sup>3</sup> but also violated a number of fundamental principles, both of general international law and of the Washington Convention of 1965. As to the latter, reference was made to Article 47, already cited,<sup>4</sup> on provisional measures, and to Article 26, providing that:

consent of the parties to arbitration under this Convention shall . . . be deemed consent to arbitration *to the exclusion of any other remedy*.<sup>5</sup>

It followed that the Moroccan courts were totally incompetent in a case pending before the international Tribunal even to order pseudo- or real 'provisional measures'.

As to the former principles, the requesting party relied on:

The principle universally admitted by international tribunals . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute.<sup>6</sup>

It was submitted that the various measures taken in Morocco, or others about to be taken<sup>7</sup> for the completion or operation of the hotels, *did* in fact

<sup>1</sup> As stated above, a management contract was due to be signed between each H.I.S.A. company, as hotel proprietor, and the H.I. Group as manager. It was claimed by H.I. that the contract was strictly according to a standard model used in hundreds of other cases throughout the world and that the Government's refusal, unaccompanied as it was by motives or counter-proposals, was unreasonable.

<sup>2</sup> The two hotels continued thereafter to be operated under the name 'H.I.' (under the supervision of the Ministry of Tourism)—a fact which led to protests by the claimants; the name was eventually modified.

<sup>3</sup> It is perhaps worthy of note that one of the purposes of the Basic Agreement could not in any case be achieved by the unilateral action of local authorities, i.e. the 'integration' of the four hotels within the world-wide chain of the H.I. Group. This factor would doubtless have proved a relevant, and indeed important, factor if the Tribunal had been called upon to adjudicate upon questions of compensation.

<sup>4</sup> Cf. also Article 39 of the 'Arbitration Rules', and Note A.

<sup>5</sup> Emphasis added.

<sup>6</sup> P.C.I.J., *Electricity Company of Sofia and Bulgaria* case, P.C.I.J., Series A/B, no. 79, p. 199; see also I.C.J., *Case concerning U.S. Diplomatic and Consular Staff in Teheran*, Order of 15 December 1979, p. 21.

<sup>7</sup> H.I. local representatives were also ordered, with the threat of penal sanctions, to furnish all plans to the Moroccan authorities. A press campaign against H.I. also developed in Morocco.



aggravate the dispute, that they prejudiced the claimants' rights and interests, sometimes in an irreparable manner, and that they would make more difficult, or impossible, the enforcement of an award, if favourable to them on the merits. The claimants were relying also, among other precedents, on the well-known Order of the International Court of Justice in the *Anglo-Iranian Oil Company* case of 5 July 1951—given, it should be recalled, notwithstanding the Iranian objection to the Court's jurisdiction.<sup>1</sup> This Order contained, in particular, two 'indications' which seemed to the claimants of considerable relevance in the present instance, one relating to the operations of the company, and the other relating to its management.<sup>2</sup> In any case the claimants strongly emphasized that the Moroccan courts had no jurisdiction and that the Government, in resorting to them in order to take over the hotels or their building sites, had violated both the Washington Convention and general rules and principles of international law.<sup>3</sup> They insisted, therefore, that after H.I. had stopped construction or closed two hotels, the Moroccan Government was perfectly entitled to seek a way out through provisional measures, but that it ought to have turned to the Arbitration Tribunal.

The Government, announcing its intention to contest in due course the jurisdiction of I.C.S.I.D. and of the Arbitration Tribunal, contended that the Moroccan courts had sole jurisdiction regarding the provisional measures under review, and this not only in relation to the H.I.S.A. companies (subsidiaries organized by the claimants under Moroccan law) but also as a general principle—a more striking assertion in view of the precedents cited above. Such a contention would seem to negate the inherent power of international tribunals to indicate interim measures of protection,<sup>4</sup> quite apart from the direct effect of Articles 26 and 47 of the World Bank Convention. Furthermore—and a mere mention of the fact will suffice, since it is not intended here to dwell on factual aspects—the Government took the hardly surprising view that the measures requested *in casu* by the claimants were 'neither necessary nor useful', that they 'prejudiced the substance of the case',

<sup>1</sup> *I.C.J. Reports*, 1951, p. 93. The Court stressed, of course, that 'the indication of such measures in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction'.

<sup>2</sup> No. 3, 'that no measure of any kind should be taken designed to hinder the carrying on of the industrial and commercial operations of the A.I.O.C., as they were carried on prior to May 1, 1951'; no. 4, 'that the Company's operations in hand should continue under the direction of its management as it was constituted prior to May 1, 1951, subject to such modifications as may be brought about by agreement . . .'; cf. *International Law Reports*, 1952, p. 504.

<sup>3</sup> Cf. Advisory Opinion in the *Mosul* case, *P.C.I.J.*, Series B, no. 12, p. 32, and the Report of J. B. Scott to the Second Hague Peace Conference, *Acts and Documents* (1907), vol. 1, p. 367, and the recent study of Judge T. Elias, cited above, p. 133 n. 1.

<sup>4</sup> Some doubt appears to be cast on this inherent power by the tendency of those who would request the Court to refrain from indicating any interim measures until it has finally decided that it has jurisdiction. As rightly observed by Judge Elias, *loc. cit.* above (p. 133 n. 1), at p. 11, this is not in keeping with international precedents and would obviously deprive this procedure of most or all of its usefulness.

etc., while the Moroccan measures 'assured the protection of the interests of both parties *pendente lite*'.<sup>1</sup>

The difficulty in which an arbitration tribunal, whether *ad hoc* or 'institutional', finds itself when called upon to decide this kind of controversy at the very beginning of arbitration proceedings will be readily appreciated. At such an early stage, when no evidence whatever has yet been adduced, nor any pleadings filed, the tribunal has little or no possibility of ascertaining the truth, but it has to make a quick, though cautious, decision.<sup>2</sup>

The decision given on 2 July 1972 (i.e. immediately following the oral arguments of the parties) can be characterized briefly as a strong one on the legal principles involved while *in concreto* extremely prudent (some would even say timid). On the first aspect, the decision deserves to be cited in full:

The Parties were in agreement to recognize before the Tribunal that at the date of this Decision contractual relations remain in existence between them based on a series of commitments the foundation of which apparently is the Contract of December 5, 1966. It follows that the Parties are under an obligation to abstain from all measures likely to prevent definitely the execution of their obligations.

The Tribunal therefore considers that it has jurisdiction to recommend provisional measures according to the terms of Article 47 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the Parties still having the right to express, in the rest of the procedure, any exception relating to the jurisdiction of the Tribunal on any other aspect of the dispute.<sup>3</sup>

Concretely, the Tribunal takes a middle-of-the-road attitude: it declines to recommend a series of measures suggested in the request, and is understandably reluctant to appear to pass judgment even indirectly, at that stage, before the 'respective responsibilities of the Parties regarding the situation of the enterprise in Morocco' have been established. Moreover—and this observation deserves notice—the Tribunal considers that:

To some extent these requests bear on injunctions which are beyond the framework of provisional measures which the Tribunal could consider.

The interpretation of this rather vague sentence must remain a matter of conjecture and one can only speculate on whether the Tribunal was careful, especially in the first arbitration under the I.C.S.I.D. system, not to assert its authority with regard to a sovereign State too much, or whether it considered that, by their general nature, certain types of provisional measures should as a rule not be recommended by international tribunals. On the other hand, and contrary to the defendants' submissions, the Tribunal did not content itself with affirming its

<sup>1</sup> See decision of the Arbitration Tribunal of 2 July 1972, p. 5.

<sup>2</sup> While affording ample opportunity to the defendant to reply to the request for interim measures, the Tribunal refused to postpone its decision until after the defendant's reply to the—future—claimants' first memorial.

<sup>3</sup> I.C.S.I.D. English translation from the French original.

jurisdiction; it did exercise it and considered it 'its duty to make . . . recommendations to the Parties'. The first one is of a general character:

1. Both Parties are invited to abstain from any measure incompatible with the upholding of the Contract and to make sure that the action already taken should not result in any consequences in the future which would go against such upholding.

A second recommendation, formulated in a carefully balanced manner, concerns the exchange of information by the parties regarding the management of the completed hotels and the completion of those hotels still to be constructed.<sup>1</sup> In a third and last recommendation, the Tribunal, taking special account of one of the claimants' complaints, recommended consultations 'in order to maintain in the hotels the character of the enterprise which is part of the international chain of Holiday Inns Hotels'.

From the facts summed up above, it should be apparent that the Tribunal took a wise and constructive decision, if somewhat vague and limited in scope. In the nature of things, its practical effects on the site were to depend on the goodwill of the parties, but the jurisdiction of the international Tribunal is strongly affirmed, as well as the general duties of all parties to an arbitration. Nothing is said or implied which could touch the merits of the litigation, but a discreet warning is clearly, if indirectly, given to both parties that the Tribunal could and would take notice of any disregard of its recommendations. In the circumstances, the claimants could hardly expect, and probably did not expect, more from the Tribunal. However, an additional, and perhaps more effective, measure could have been an invitation to both parties to report at regular intervals on their compliance with the recommendations of the Tribunal.

## V. QUESTIONS OF JURISDICTION

### A. *The Moroccan H.I. companies*

Following Rule 2 of the I.C.S.I.D. 'Institution Rules', the request for arbitration registered by I.C.S.I.D. on 13 January 1972 had *inter alia* to 'designate precisely each party to the dispute' and to indicate 'its nationality on the date of consent'. It did, of course, also contain information indicating that there was 'between the parties, a legal dispute arising directly out of an investment'.

As stated above, the request noted in particular that Holiday Inns S.A. (of Glarus, Switzerland) and O.P.C. were acting both 'in their own name and in the name and on behalf of six other companies' (including the four so-called 'H.I.S.A. companies'). This broad and somewhat vague formula may well have been resorted to by the claimants in order to gain time for a further study of the complex nexus of contractual relationships

<sup>1</sup> The Arbitration Tribunal did not, and could hardly be expected to, invite the Government to stop constructing or operating the hotels, but tried to ensure that the interests of the enterprises would nevertheless be safeguarded.



between the many participants in the 'Moroccan Project'. Whatever its practical merits, the formula could hardly disguise the fact that some at least of the claimant companies were jointly controlled subsidiaries organized in Morocco under the local law and, therefore, of undisputable Moroccan 'nationality'.<sup>1</sup>

According to Article 25 (2) (b) of the Washington Convention, such a company could, however, be considered as a 'national of another Contracting State' (i.e. a State other than Morocco) provided that 'because of foreign control, the parties have agreed' that it should be treated as such 'for the purposes of this Convention'.<sup>2</sup>

The practical importance of this provision need not be emphasized: whenever an investment is made, the creation of a juridical person of local law is likely or even bound to result.<sup>3</sup> Such a creation may take place at the outset and be provided for in the initial agreement or—as happened in the present instance—it may be decided upon at a later stage.<sup>4</sup> One fact is clear: no attempt had been made at the time to renew, confirm or modify in any way the original consent given in the Basic Agreement to international arbitration and to I.C.S.I.D. jurisdiction. Neither the Government (which appears to have suggested the creation of the four H.I.S.A., as a means of acquiring an interest in the hotels) nor the foreign Group seems to have been aware of any difficulty, or indeed of any change in the relationship established by the initial contract. For both parties, the four H.I.S.A. were from the start and throughout their legal existence nothing more than a convenient formal and technical device used in performing the obligations resulting from the Agreement and, in particular, in acquiring the sites and establishing with the Moroccan lending institution (the C.I.H.) the necessary arrangements and mechanisms involved in financing construction. This attitude may well be considered as a sign of quite ordinary business 'realism' and common sense. However, lawyers should know better; as subsequent events were to show, it should *not* have been taken for granted that the creation of these four 'Moroccan' companies had no possible consequences in the field of settlement of disputes.<sup>5</sup> Such a degree of optimism is all the more remarkable since the history of international investments is comparatively rich in precedents showing the reluctance of States, whenever a dispute arises, to fulfil their undertaking to submit to neutral, third-party, adjudication.

Hardly surprisingly, the defendant Government objected to the

<sup>1</sup> By all possible criteria or 'connecting factors' recognized or referred to in private international law: social seat, at least in the 'statutory' and not the 'effective' sense, place of activity, etc., except, of course, the 'control' test.

<sup>2</sup> See also Rule 2 (1) (d) (iii) of the 'Institution Rules'.

<sup>3</sup> See Paul Reuter, *loc. cit.* above (p. 123 n. 3).

<sup>4</sup> By an additional agreement of 14 June 1968. The four H.I.S.A. companies held their constitutive meeting on 18 September 1968, i.e. nearly two years after the Basic Agreement was executed.

<sup>5</sup> And—even more—the execution by each of the H.I.S.A. of separate contracts with the Moroccan C.I.H., contracts including *inter alia* a standard clause referring disputes to the local (Moroccan) courts.

Arbitral Tribunal's jurisdiction with regard, in particular, to those H.I.S.A. companies, alleging that it had never consented to treat them as 'nationals of another State' and therefore never had consented to I.C.S.I.D. arbitration with respect to them. Since the absence of any *express* consent was undisputed, the question had to be decided 'whether such an agreement must be expressed or whether it may be implied'.<sup>1</sup> It may be remembered that *the text* of Article 25 (2) (b) of the Convention gives no indication on this point, providing as it does simply that the parties must 'have agreed'.<sup>2</sup> The question had thus to be decided for the first time and the Arbitral Tribunal must have been fully conscious of the possibly far-reaching consequences of the 'precedent' it was called upon to establish.

One might have thought that, had the drafters of the Convention wished to request *express* agreement, they would have said so in the text, in the interest of legal certainty. The absence of any precision or qualification might thus lead one to assume that, according to general principles of the law of contract, consent or agreement may be either express or tacit, unless otherwise required. On the other hand—and the Moroccan Government did not fail to press this point—a State's consent to international adjudication of disputes with its own nationals is an act of such impact and importance as to deserve unequivocal expression. The problem cannot, however, be summarized in such simple terms. Having regard to its general importance, a somewhat more detailed analysis appears to be called for, with some reference to the conflicting arguments put forward by the parties.

From the Government's viewpoint, the Tribunal had no jurisdiction with respect to the four H.I.S.A. companies, and this for several, independent, reasons: the companies were, admittedly, not yet in existence at the time of execution of the Basic Agreement, which had never been assigned to them.<sup>3</sup> Not being parties to the Basic Agreement, the H.I.S.A. had no right to rely on its arbitration clause. Moreover, they were juridical persons of Moroccan nationality, as said above, and no consent had ever been given by Morocco as required under Article 25 (2) (b) of the Convention. The first line of argument, based on the date of consent to arbitration and the posterior 'birth' of a party to the dispute, was also and mainly used by Morocco with regard to other claiming companies and it will be discussed below.<sup>4</sup> As to the second objection, the claimants were opposing two kinds of answer, one general and purely legal and the other factual, at least in part, and connected with the particular circumstances of the case.

<sup>1</sup> See decision of 1 July 1973, no. 33.

<sup>2</sup> See also Note J to Rule 2 of the 'Institution Rules', which gives no further precision. Anyway, the Notes have no official character, as already stated, and could not possibly alter the meaning of provisions contained in the Rules or in the Convention itself.

<sup>3</sup> But see, later in the text, the reference to Article 13 of the Basic Agreement, under which the signatory companies were entitled to assign the contract to any affiliates of their choice.

<sup>4</sup> See below the discussion of the objections with reference to Holiday Inns, Glarus, and O.H.M.

First, they contended that the Washington Convention did in fact require (in its Article 25 (1)) a *written* consent, but failed to require any particular form with regard to the special situation contemplated in Article 25 (2) (b): according to the clear text of the latter provision, it was enough that the parties 'have agreed' to treat a juridical person, because of foreign control, 'as a national of another contracting State'.<sup>1</sup> This literal interpretation was said to be in accord with the needs of international investment practice: the setting-up of a local subsidiary in a capital-importing State was a frequent and often necessary technical means of implementing the contract, and it would be detrimental to the fulfilment of the common aim if formalistic conditions were to be implied.<sup>2</sup>

This may well be true, as far as it goes: the fact remains, nevertheless, that Article 25 (2) (b) constitutes in itself a relatively bold departure from the traditional principles of international law, according to which a State cannot be sued internationally by its own nationals. When the Convention was being drafted, this provision met with considerable opposition and was eventually introduced by a small majority.<sup>3</sup> Even with the safeguard of this special consent, this possibility is still viewed with distaste by some States (e.g. in Latin America), which may not appreciate the important restriction on the right of diplomatic protection which was introduced simultaneously, as a counterpart to I.C.S.I.D. arbitration, by Article 27 of the Convention.<sup>4</sup> The Moroccan Government stressed that, as a serious 'derogation from sovereignty' (*sic*), such consent should not be presumed or admitted easily: a clear and express consensus was essential 'for the purposes of the Convention' and it had to be specific as to the other 'nationality' of the local company.<sup>5</sup>

Such general considerations were bound to carry much weight with an international tribunal, especially when called upon for the first time to interpret such an important provision of the Convention of 1965. The claimants' contention might well have appeared doomed to fail, if not altogether untenable, but for the particular circumstances of the case. It seems to have been a fact that the four H.I.S.A. companies were created with the full consent, and indeed upon the repeated requests, of the Moroccan Government itself—'as a legal support' of the Project (to quote an additional agreement of October 1970)—in order both to facilitate the

<sup>1</sup> Cf. Notes 15 and 16 to the Model Arbitration Clauses of I.C.S.I.D.: Doc. ICSID-5, VI, p. 10.

<sup>2</sup> The practical point made above could easily be countered by the simple remark that it is up to the parties and their counsel, whenever the creation of a local subsidiary is decided upon, to see to it that the various requirements of the Washington Convention are fulfilled.

<sup>3</sup> The Legal Committee decided to admit it by 24 votes to 20, with 3 abstentions; cf. *Documents concerning the Origin and the Formulation of the Convention*, vol. 2, p. 871.

<sup>4</sup> On the extreme sensitiveness of new, developing, States in particular, see, e.g., Feliciano, in *Judicial Settlement . . . —An International Symposium* (above, p. 132 n. 4), at pp. 129–30.

<sup>5</sup> As an additional argument, it was pointed out on the Moroccan side that the H.I.S.A. companies could be either Swiss or American, according to the 'control' test, and that no clear consent did exist on this particular point. This argument appears to be contradicted by an I.C.S.I.D. document (Doc. ICSID-5, VI, p. 10 n. 16) on Model Clauses.



procedure of construction financing by the C.I.H. under local regulations<sup>1</sup> and to allow the granting, free of charge, to the Government of a participation in each hotel when completed, as mentioned above.<sup>2</sup> The foreign builders contended, therefore, first, that the original Basic Agreement had already provided for a loan to be made to the foreign signatories 'or to a company to be nominated by them'; and secondly, that they had had no interest whatever in the setting-up of the four local companies, which had in fact been suggested and indeed requested by the Government. Further it was contended that the latter Government had always considered the H.I.S.A. companies as totally foreign controlled and not really Moroccan and, as proved by the correspondence exchanged, had treated them at all times as identical to their foreign 'mother companies'. It followed that, in law, the Government had, in their submissions, 'agreed' within the meaning of Article 25 (2) (b) to treat the H.I.S.A. as nationals of another contracting State; moreover, assuming that the Agreement should have been in writing, the Government could no longer in good faith rely on the H.I.S.A.s' Moroccan 'nationality', but was 'estopped' from disputing either their *locus standi* or I.C.S.I.D. jurisdiction in respect to them.

Such being the respective contentions of the parties, the solution adopted by the Arbitration Tribunal should now be quoted and it is of particular interest:

33. The question arises, however, whether such an agreement must be expressed or whether it may be implied. The solution which such an agreement is intended to achieve constitutes an exception to the general rule established by the Convention, and one would expect that parties should express themselves clearly and explicitly with respect to such a derogation. Such an agreement should therefore normally be explicit. An implied agreement would only be acceptable in the event that the specific circumstances would exclude any other interpretation of the intention of the parties, which is not the case here.<sup>3</sup>

It is submitted that the decision is correct and indeed wise: consent to international arbitration between a State and a juridical person which is, legally or formally speaking, its 'national' needs to be unequivocal and not open to doubt. Too liberal an interpretation of Article 25 (2) (b) would hardly contribute to a wider acceptance by States of I.C.S.I.D. arbitration and, therefore, to the protection of foreign investors. It is up to the latter to take all necessary precautions whenever the creation of a 'local' legal person (wholly or partly owned) is suggested or decided upon. But it is

<sup>1</sup> These regulations made it impossible—or so it had been alleged on the Government's side—to grant a loan of the required amount to a single borrower; hence the necessity to create four local companies, as separate 'borrowers'.

<sup>2</sup> This seems to have been the 'price' paid by the H.I. group, in an additional agreement of June 1968, for obtaining the Government's assistance in the matter of purchasing the sites. Such participation was thought to have definite political and psychological advantages for the Government.

<sup>3</sup> Decision of 1 July 1973, nos. 33-9. The decision is also based, somewhat subsidiarily, on certain I.C.S.I.D. documents, e.g. Rule 21 (1) (d) (iii) of the 'Institution Rules', whence it appears that 'an express consent of the parties is normally required'.

worthy of note that the Arbitral Tribunal refrained from laying down an absolute rule: a special agreement should '*normally*' be expressed or explicit; it can, however, be implied in special circumstances 'excluding any other interpretation' than a consent by the State concerned.<sup>1</sup> In the *Holiday Inns* case, the parties had no 'intention' at all in that respect; it never seemed to have occurred to them that the creation of the H.I.S.A. companies might one day give rise to an arbitration problem. Therefore it could hardly be said that the Government had had any definite intention, to agree or to disagree, to consent or not to consent.

In conclusion, the Tribunal held that 'the H.I.S.A. companies cannot be Parties to the present proceedings before I.C.S.I.D.', but it was careful to note that 'the situation of the H.I.S.A. companies may have to be taken into account in judging the performance of the obligations which the Agreement of December 5, 1966 and the additional related agreements have created for the Government of Morocco and for the companies which are Parties to the present arbitration'.

### *B. Holiday Inns S.A. of Glarus*

With regard to the company Holiday Inns, Glarus, created<sup>2</sup> in Switzerland for the purposes of the Moroccan Project, the Government did not, and could not, dispute the existence of its 'consent in writing' to arbitration. Indeed it contended that Holiday Inns, Glarus, was (together with the 'subsidiary of O.P.C.') the only *signatory* to the request for arbitration which could rely on such a 'consent in writing' to the jurisdiction of I.C.S.I.D.<sup>3</sup>

The Government had signed the Basic Agreement of 5 December 1966 with 'Holiday Inns, Glarus, Switzerland' (and the 'subsidiary of O.P.C.', on which more will be said later) and it did not deny that it had 'intended that the Centre should have jurisdiction in respect of them'. However, it claimed that the Tribunal was—with regard to that company—'not competent to entertain the Request for Arbitration' and had no jurisdiction, on two main grounds: (a) because Switzerland had, on 5 December 1966, not yet become a party to the Washington Convention (it became one on 14 June 1968, and Morocco itself on 10 June 1967); and (b) because the company did not yet exist on the date of the Basic Agreement, having been registered—in the Commercial Register of Glarus—only on 1 February 1967. Both objections were fully argued by the parties and eventually rejected by the Tribunal. Its decision constitutes an important

<sup>1</sup> This reasoning only relates—it should perhaps be stressed—to the particular consent required by Article 25 (2) (b) and *not* to the (general) consent to arbitration referred to in Article 25 (1). As will be shown below, the difference becomes apparent when the Tribunal deals, in paragraph 30 of its decision, with O.P.C. and Holiday Inns Inc. of America, which were *not* named in the Basic Agreement and, therefore, could not, according to the Government's objection, rely on any 'consent in writing' to arbitration—an argument which was rejected by the Tribunal.

<sup>2</sup> As a wholly owned subsidiary, by Holiday Inns Inc. of America, as already pointed out.

<sup>3</sup> It will be seen that this allegation was rejected by the Tribunal—except, and for other, specific, reasons, in the case just mentioned of the H.I.S.A. companies.

precedent, which should, it is submitted, be kept in mind by all present and future users of the Washington Convention.

The first objection was based on an extremely narrow and indeed restrictive interpretation of the Washington Convention and, in particular, of the terms 'national of a Contracting State' contained in Article 25 (1) and defined in Article 25 (2). According to the latter provision, a 'national of a Contracting State' means:

any juridical person which had the nationality of a Contracting State other than the State party to the dispute *on the date on which the parties consented to submit such dispute to . . . arbitration . . .*<sup>1</sup>

This date—it was contended on the Moroccan side—was and could only be the date of the Basic Agreement (containing the arbitration clause), i.e. 5 December 1966. On that date, Holiday Inns S.A., Glarus, was *not*, therefore, a 'national of another Contracting State' since it was common ground that Switzerland had not ratified the Convention before 1968.<sup>2</sup>

According to the Moroccan interpretation, consent to the jurisdiction of the Centre could only be given by a juridical person having the nationality of a State which had *previously* ratified the Convention—a condition which was certainly not expressed in the text but was said to be supported by the natural meaning of the words and the 'general approach' of the Convention.<sup>3</sup> Inasmuch as Morocco itself had only become a Contracting State on 10 June 1967, the same line of reasoning would seem to lead to the conclusion that, when it entered into the Basic Agreement on 6 December 1966, Morocco—like Switzerland—was not and could not be a 'Contracting State' within the meaning of Article 25 (1) of the Convention. But this part of the argument was, understandably, not pressed by Morocco.

On the other side, the rather obvious point was made that the letter of the Convention does not require that the 'home State' of the juridical person be a 'Contracting State' at any specific date. In the absence of precise temporal requirements, therefore, the position had to be examined on the date of request for arbitration. The *travaux préparatoires* were also relied upon to show that at no time during the history of the Convention had its drafters intended to exclude or forbid ratification *following* consent to arbitration.<sup>4</sup> For the claimants, the 'critical date'—with regard to the various conditions laid down by the Convention (as to the 'other Contracting State')—was thus the date of filing of the request for arbitration.<sup>5</sup> A teleological interpretation would appear to support this

<sup>1</sup> Article 25 (2) (b), italics added.

<sup>2</sup> Moreover, the Government contended that the Company had no nationality at all, on that date, since it was not in existence yet. On this, see below in the text.

<sup>3</sup> As illustrated, in the Moroccan contention, by the *travaux préparatoires* and by various provisions of the Convention, e.g. Articles 33, 44, 66 (2) and 72.

<sup>4</sup> See *Documents Concerning the Origin and the Formulation of the Convention*, vol. 2, Docs. 6 and 21, pp. 133 et seqq. and 152, and Report by Broches, in vol. 3, Doc. 33, pp. 363 et seqq., and 395.

<sup>5</sup> The requirement concerning the nationality (of another Contracting State) in Article 25 (2) (b)—cf. Rule 2 of the 'Institution Rules'—appears to be an exception, in so far as it expressly relates to the



conclusion, if one keeps in mind for instance the balance established by the Convention between the interests of the investment-importing States and those of the investment-exporting States. The former, once they have consented to the jurisdiction of I.C.S.I.D., are fully protected against diplomatic protection by the latter.<sup>1</sup> From this point of view, it is entirely sufficient that the quality of 'Contracting State' (i.e. the fact of ratification) be checked on the date when the dispute is submitted to arbitration.<sup>2</sup>

However this may be, the consent given by a company whose 'home State' has not yet ratified the World Bank Convention need only be interpreted as a *conditional* consent or undertaking, to become fully and finally binding for the parties to the contract on the date of ratification of the Convention. The legal argument was strengthened by the facts of the case and the circumstance that—when entering into the Basic Agreement of 5 December 1966—Morocco was fully aware of the fact that Switzerland had not yet become a party to the Washington Convention. Similarly, ever since Morocco itself ratified the Convention (in June 1967), it had been kept fully informed of the signatures and deposits of instruments of ratification (see Articles 73 and 75 of the Convention). Could it be imagined that Morocco, when signing the contract containing the I.C.S.I.D. arbitration clause, had no intention of entering into a binding arbitration agreement, or had no knowledge or suspicion of what it was later to invoke as fundamental objections to jurisdiction of the Tribunal?

A similar insuperable difficulty confronted the second part of the Moroccan objection to jurisdiction raised against Holiday Inns S.A., Switzerland. The Government had signed an agreement which expressly identified one of the parties as the company 'Holiday Inns S.A., Spielhof 3, Glarus, Switzerland'. Now the same Government was contending that, although it had intended to confer jurisdiction upon I.C.S.I.D. in respect of that company,<sup>3</sup> Holiday Inns, Glarus, failed to meet the requirements of Article 25 of the Convention because it was not legally in existence at the date of the Basic Agreement (and in particular had then 'no nationality at all').

The relevant facts have been outlined above and were not in dispute: at the time of signing the contract, the two American partners (H.I. and O.P.C.) had already decided that, in keeping with a frequent business practice, they would perform the Project through two wholly owned

date of consent, in order to avoid a kind of 'forum shopping', i.e. the acquisition, after the date of consent but before the request for arbitration, of the nationality of a Contracting State.

<sup>1</sup> Except, of course, within the narrow limits of, and in the hypothesis contemplated by, Article 27.

<sup>2</sup> As an additional point, H.I., Glarus, considered that the I.C.S.I.D. had tacitly recognized the validity of its arguments by the very fact of registration of the request, since the Centre was well aware of the dates of ratification by the States concerned. This and similar arguments led the Tribunal to state (in its decision of 1 July 1973) the rather obvious fact that 'the registration of the Request by the Secretary-General shows and only shows that the Request was not in his view manifestly outside the jurisdiction of the Centre', and that such registration 'does not of course preclude a finding by the Tribunal that the dispute is outside the jurisdiction of the Centre'.

<sup>3</sup> And in respect of 'the subsidiary of O.P.C.' also mentioned expressly in the Basic Agreement.

subsidiaries to be created for the purpose. The Moroccan Government was fully aware of this fact, as shown in particular by the very designations in the Agreement of the 'Parties of the Second Part' (and also by the signing, following the Government's request, of a 'letter of guarantee' of the same date by the two American mother companies). The Government appears also to have known full well that, on the date of signing, the preparations made by the H.I. group in order to create a Swiss subsidiary had not been completed.<sup>1</sup> The Charter and By-Laws of the company were signed a few weeks later, on 30 December 1966, and the formalities came to an end on 1 February 1967 with the formal registration of the new company in the Commercial Register, a registration which, under the Swiss Code of Obligations (Article 643), is necessary to confer legal personality upon a stock corporation.

Several distinct arguments were put forward by the claimants to meet the Moroccan objection. First, under the personal law of the company, which was undoubtedly Swiss law,<sup>2</sup> a stock corporation in a process of constitution is not entirely devoid of existence and the legal acts made on its behalf do have some effects.<sup>3</sup> Secondly, whatever the position may have been in Swiss private law, the Government, when it signed the Basic Agreement with Holiday Inns, Glarus, Switzerland, had thereby recognized its legal personality and existence, in so far as Moroccan law and the international legal order were concerned; the requirements laid down by the Convention were thus fulfilled (independently of the formalities and the type of company or legal person contemplated by Swiss internal law). Thirdly, in any event, it was stressed that the Government had knowingly contracted with a corporation in a process of creation and that it could not in good faith rely on the absence of Swiss registration on the date of the contract. All the less so since it had no legitimate interest whatever in objecting to a fact (ulterior registration) which had not caused the slightest damage to the Government and had been totally accepted by it. The claimants believed, in other words, that the Government was precluded from raising that objection under the general principle of good faith in an international sense.<sup>4</sup>

To sum up, the claimants counter-attacked by emphasizing the 'artificial'

<sup>1</sup> At least the Government never claimed to have been ignorant of the fact—nor did it raise, until after the arbitration had begun, any question relating to the 'subsidiary of O.P.C.'.

<sup>2</sup> Whether under the criterion of 'incorporation' or under that of the 'social seat', which are traditionally considered as relevant in Swiss conflict of laws (no clear and final choice between the two having ever been made in the decisions of the Swiss Federal Tribunal; see, e.g., the cases 80.II.53, *Royal Dutch*, of 2 February 1954 and 95.II.442, *Prospera*, of 16 December 1969; cf. also 94.I.80, 99.II.260).

<sup>3</sup> See, e.g., Article 645 of the Swiss Code of Obligations. It is unnecessary to enter here into a discussion of this perhaps not decisive argument.

<sup>4</sup> It appears to be broader, let it be mentioned in passing, than the concept of 'estoppel' in the traditional sense of English law. Cf., e.g., B. Cheng, *General Principles of Law* (1953), *passim*; D. W. Bowett, 'Estoppel before International Tribunals and its Relation to Acquiescence', this *Year Book*, 33 (1957), pp. 176–202; A. Martin, *L'Estoppel en droit international public* (1979), in particular pp. 71 et seqq. and pp. 331–6.

character of the Moroccan objections, which interpreted the Washington Convention in an extraordinarily formalistic and narrow manner. The Moroccan theory on the date of consent amounted, in their submission, to an exclusion of all expression of intent subject to suspensive conditions and to a requirement that all conditions be met simultaneously at the precise minute when the contract was signed. The Convention (as well as the Basic Agreement) was thereby deprived of a large part of its effectiveness, contrary to the evident intention of its signatories and contrary, in the concrete case, to the recognized intention of the Moroccan State itself to accept the jurisdiction of I.C.S.I.D. for 'any dispute' relating to the contract and the 'Moroccan Project'. Furthermore, the Government's position, however ably presented by its counsel before the Tribunal, happened to be in flat contradiction to its own attitude both at the time of signing the Basic Agreement and afterwards. The Government had started to perform the contract long after the respective dates of registration of Holiday Inns, Glarus, and of the coming into force of the Washington Convention between all the States concerned,<sup>1</sup> and it had at all times (prior to the arbitration proceedings) treated Holiday Inns, Glarus, as a Contracting Party.

Hardly surprisingly, the Arbitration Tribunal rejected the Moroccan objection relating to Holiday Inns, Switzerland, and this rejection is as remarkably categorical as it is concise:

No. 20. The Tribunal is of the opinion that the Convention allows parties to subordinate the entry into force of an arbitration clause to the subsequent fulfilment of certain conditions, such as the adherence of the States concerned to the Convention, or the incorporation of the company envisaged by the agreement. On this assumption, it is the date when the conditions are definitely satisfied, as regards one of the Parties involved, which constitutes in the sense of the Convention the date of consent by that Party. As for the date of consent contemplated by Article 25 (2) b of the Convention, it will automatically be the date on which the two corresponding consents coincide . . .

Having noted that the Government did not deny that it entered into the Basic Contract and intended that the Centre should have jurisdiction in respect of 'Holiday Inns S.A. and the subsidiary of Occidental Petroleum', the Tribunal stated:

the only reasonable interpretation of the Basic Agreement is to hold that the Parties when signing the Agreement envisaged that all necessary conditions for jurisdiction of the Centre would be fulfilled and their consent would at that time become fully effective.<sup>2</sup>

<sup>1</sup> The Convention had, however, been in force with regard to the United States since 14 October 1966.

<sup>2</sup> The Tribunal went on to say that 'Morocco became a Contracting State on June 10, 1967 and Switzerland on June 14, 1968; the Company became a juridical person in 1967. Consequently, it is on the last of those dates, i.e. June 14, 1968, that the Parties "have consented to submit the dispute to arbitration" within the meaning of Article 25 (2) (b) of the Convention. *From that date neither Party could unilaterally withdraw its consent as provided in Article 25 (1)*' (italics added).



This interpretation, it is submitted, is hardly open to criticism and it should have much more than mere historical interest, limited to the early life of the Washington Convention. More States, whether capital-importing or capital-exporting, may be expected to ratify the Washington Convention in the future, sometimes *after* a contract containing an I.C.S.I.D. arbitration clause has already been entered into by them or one of their companies.<sup>1</sup>

### *C. The position of the mother companies*

It will be remembered that the two American partners in the 'Moroccan joint venture', i.e. Holiday Inns Inc. of America and Occidental Petroleum Corporation (O.P.C.), had planned to act, in keeping with standard business practice, through wholly owned subsidiaries to be created for the purpose. Accordingly, the Basic Agreement did not designate as 'Parties of the Second Part' the two American companies themselves but 'Holiday Inns S.A., Glarus, Switzerland and a subsidiary of O.P.C.'. On the same day as the Basic Agreement, i.e. on 5 December 1966, as said above, the two American companies had signed, upon the Government's request, a unilateral letter 'warranting' the full performance of the Agreement by their respective subsidiaries.<sup>2</sup>

Attention should also be drawn to Article 13 of the Basic Agreement, under which:

This Contract may be assigned at any time by the Parties of the Second Part to any affiliated corporation they may jointly own or designate, or such assignment may be to separate corporations or affiliates of each of the Parties of the Second Part.

This general set-up, which is hardly unusual in similar ventures, would seem to show, or so it was alleged on the claimants' side, that the Government had at all times dealt, and intended to deal, with the American *group* made by H.I. and O.P.C. Both during the negotiations and after the execution of the Basic Agreement, such was indisputably the economic reality. But in order to object to the jurisdiction of I.C.S.I.D. and of the Arbitration Tribunal<sup>3</sup> the Government relied, perhaps not unnaturally, on a variety of legal considerations, such as the designation of the signatories to the Basic Agreement and the distinct, independent juridical personality of the several companies and affiliates involved. The Government relied here on the indisputable fact that neither H.I. Inc. nor

<sup>1</sup> With regard to the 'subsidiary of O.P.C.', the Government had raised much the same objection as in the case of H.I., Glarus, but, on top of this, disputed (a) that such subsidiary had ever come into existence, and (b) that it was, as mentioned in the request for arbitration, the American company 'Occidental Hotels of Morocco' (O.H.M.). This objection was first joined to the merits in a first stage, eventually to be rejected by the Tribunal in a decision dated 27 July 1975 on the basis of the evidence produced; it was proved that O.H.M. had been validly created in 1968.

<sup>2</sup> In this letter the two American companies undertook, in consideration of the Government's entering into the Basic Agreement, 'to assume all responsibilities of guarantors to warrant all commitments and liabilities and the true and complete fulfilment of all obligations' that the signatory companies to the Agreement 'have entered and will enter into' pursuant to the Basic Agreement.

<sup>3</sup> The question whether it is accurate to characterize these objections as objections *to jurisdiction* is referred to later in the text.

O.P.C. were signatories to the Basic Agreement. It followed in its view that neither could, as 'guarantor' or otherwise, benefit from Article 14 (the arbitration clause).<sup>1</sup>

The temptation should be resisted to under-estimate the strength of these objections and to dismiss them as purely literal and formalistic. They deserve careful consideration and the Arbitral Tribunal decided, quite rightly, to allow a full discussion between the parties, in two exchanges of written pleadings. A detailed analysis of all the legal problems involved would doubtless go beyond the limits of the present study, but a few main points must at least be mentioned.

Here again, as in the debate about the *locus standi* of the H.I.S.A. companies, entirely conflicting views were submitted to the Tribunal: the Government based its case on what may be called, for short, juridical formalism, while the claimants took, broadly speaking, the side of 'realism' (without neglecting to put forward additional, more formal, arguments).<sup>2</sup> The Government considered that the arbitration clause was, with regard to the two 'guarantors' H.I. and O.P.C., a *res inter alios acta* inasmuch as, by definition, a 'guarantor' cannot be a party to the principal contract. It insisted that the two American companies would, therefore, have been entitled to resist any Moroccan attempt to institute arbitration proceedings against them.

Obviously the claimants could not content themselves with countering this objection by a mere reference to 'economic realities'. They conceded that H.I. Inc. and O.P.C.—while in fact original parties to the 'Moroccan Project'<sup>3</sup>—could not rely on their sole quality as 'guarantors', as such, in order to derive rights from the arbitration clause. They put forward three main arguments: (i) the idea of subrogation, (ii) the notion of cession of rights, and, more generally, (iii) the principles of effective interpretation and good faith.

(i) *Guarantee and subrogation.* The claimants' case was based first on a 'general principle of law'—recognized in particular in Moroccan law<sup>4</sup>—to the effect that a guarantor is subrogated to the rights of the principal debtor in so far as he has performed the obligations the performance of

<sup>1</sup> The unilateral letter of guarantee of 5 December 1966 did not contain any specific reference to arbitration; the letter was, however, made an annex to the Agreement (cf. its Article 11).

<sup>2</sup> Regarding the H.I.S.A., it has been shown above that the controversy did *not* have to be determined by a choice on the respective merits of 'reality' versus 'legal form', but on the basis of the specific requirements in Article 25 (2) (b) of the Washington Convention.

<sup>3</sup> And to the two initial agreements, the 'letter of intent' of 28 September 1966 and the 'letter of modification' of 15 October 1966.

<sup>4</sup> It may be noted in passing that on this question of guarantee, as on many other legal points, there was little discussion between the parties on problems of applicable law and on the interpretation *in casu* of Article 42 (1) of the Washington Convention. Generally speaking, the Government seemed to hold the view that Moroccan law governed every question (perhaps as a matter of routine or of political principle, rather than as a result of any reasoned application of the Moroccan conflict rules referred to in Article 42 (1)). It is submitted that such conclusion is open to doubt, especially with regard to the letter of guarantee of 5 December 1966.

which he had 'guaranteed'.<sup>1</sup> It followed that the guarantor was entitled to invoke the arbitration clause. As a matter of fact, it was shown that both H.I. Inc. and O.P.C. had performed several of the obligations provided for in the Basic Agreement (for instance in an agreement of 14 June 1968 executed between the Government and 'Holiday Inns of America and O.P.C.' relating to the operation of the hotels). The claimants had not failed to stress the fundamental importance of the arbitration clause in the context of the contractual relations established for the 'Moroccan venture'. Relying in particular on a well-known dictum in the *Lena Goldfields* arbitration,<sup>2</sup> they emphasized that the various agreements with the Government would never have been entered into without the protection afforded by the I.C.S.I.D. arbitration clause. This clause was undoubtedly 'of the essence' of the contractual relationship; it followed that, whenever there was even partial subrogation, the latter necessarily covered or included rights accessory to the principal obligation performed, such as the right to go to arbitration.<sup>3</sup>

(ii) *Cession*. A substantially identical conclusion was to be reached, in the claimants' submission, independently of any concept of guarantee and subrogation. Article 13, already quoted, expressly allowed the assignment of the contract (and thus, necessarily, of parts of it) by 'the Parties of the Second Part', and this to 'any affiliated company' they might—jointly or separately—'own or designate'. Nothing could thus prevent H.I., Glarus, and O.H.M. (the subsidiary of O.P.C.) from assigning rights and duties under the contract, for instance to their mother companies (and/or to subsidiaries, such as the H.I.S.A. companies). Article 13 was an essential element of the whole contractual set-up, since it enabled the American partners to adopt the corporate structures and other modalities of performance which appeared most advisable from a business point of view. This flexibility was all the more required in the present instance since not one but two multinational groups (H.I. and O.P.C.) were involved, on the non-Moroccan side, and had formed between themselves a 'joint business venture' in order to deal with the Moroccan Government.

In fact, several such partial 'assignments' had taken place in pursuance of Article 13, with the full knowledge and consent of the Government—as shown *inter alia* by several additional agreements executed subsequent to

<sup>1</sup> This contention was expressly accepted by the Tribunal in its decision of 1 July 1973 (No. 27), as shown by the citations below in the text, although the Government had argued (a) that subrogation could only take place if the guarantor had been requested by the creditor to perform in lieu of the principal debtor, and (b) that no such performance had in fact taken place.

<sup>2</sup> Award of 2 September 1930; cf. Nussbaum, in *Cornell Law Quarterly*, 36 (1950), pp. 42 et seqq.

<sup>3</sup> This reasoning is expressly accepted in the decision of 1 July 1973: '27. . . . to the extent that they [O.P.C. and H.I. Inc.] have carried out obligations contemplated by the Basic Agreement they are entitled to invoke the arbitration clause', and later: '30. In the opinion of the Tribunal the arbitration clause must be considered an inseparable part of the Basic Agreement. It follows, therefore, that any Party on whom rights and obligations under the Agreement have devolved is entitled to the benefits and subject to the burdens of the arbitration clause.'



5 December 1966.<sup>1</sup> In so far as the Government had concluded with H.I. Inc. and O.P.C. (i.e. with companies other than the two signatories to the Basic Agreement) such additional agreements expressly purporting to modify the original Basic Agreement, the Government had necessarily recognized that the two American companies were entitled to benefit from, and dispose of, the Basic Agreement. It stands to reason that such cession of obligations and/or rights entailed here a cession of the right to resort to arbitration<sup>2</sup>—a general principle followed, in particular, by the Washington Convention of 1965.<sup>3</sup>

True it is that Article 25 of the Convention requires that the parties to the dispute should have given their 'consent in writing' to the submission of the investment dispute to I.C.S.I.D. jurisdiction. The Government attempted, therefore, to contend that it had never consented expressly and in writing to arbitration with regard to H.I. of America and O.P.C. This formalistic argument ran counter to both the letter and the spirit of the Washington Convention, which *does* indeed require 'consent in writing' to arbitration of a 'legal dispute arising directly out of an investment', but does *not* require that the other party be identified in writing at the outset and specifically. The fundamental condition of jurisdiction is the consent (in writing) of the 'parties to the dispute'. But this condition may well be fulfilled, e.g. in case of subrogation, succession, etc., although not all the parties have been or could be named in the original contract.

A contrary interpretation would result in paralysing in practice any transfer or assignment of contracts or contractual rights and duties. It would be unrealistic to expect that, throughout the life of a contract containing an arbitration clause, any succession to or transfer of rights and duties would only be fully effective if the original consent to arbitration was each time renewed or confirmed in writing.<sup>4</sup> What is indeed essential under the Convention is (1) that the actual dispute be shown clearly to fall within the scope of the arbitration clause<sup>5</sup> and (2) that each claimant (or each defendant) be shown to be, in the particular case, a 'party to the dispute'—whether or not such party happens to be named or identified as signatory to the original contract.

<sup>1</sup> e.g. Agreement with the Government of 14 June 1968, Protocol of 5 September 1970 and Agreement of 26 October 1970—all containing express references to the Basic Agreement.

<sup>2</sup> See on this principle, for example, M. Domke, *The Law and Practice of Commercial Arbitration* (1968), p. 84.

<sup>3</sup> The Convention only limits the principle in that it requires a cession to a 'national of a Contracting State': Article 25 (2); cf. Pirrung, *op. cit.* above (p. 123 n. 3), at p. 85. On the requirement of 'consent in writing', see below in the text.

<sup>4</sup> This conclusion of common sense appears to have been adopted by I.C.S.I.D. in its publication on 'Model Clauses of Consent to Jurisdiction'; see Doc. ICSID-5, no. 17. In its decision of 1 July 1973 the Tribunal refers, as confirming its own reasoning, to the Model Clause 'which would be binding on successors to the original parties without requiring a renewed consent in writing'. However, I.C.S.I.D. recommends, understandably, that the parties indicate clearly that the arbitration clause will apply to successors.

<sup>5</sup> There was no controversy on this particular point. It will be remembered that Article 14 of the contract referred to 'any dispute . . . '.

Since it may safely be expected that some defendants at least, in future investment disputes, may be tempted to raise objections similar to the Moroccan ones, it appears useful to quote further relevant passages of the Tribunal's decision. After noting that the two mother companies were entitled to invoke the arbitration clause 'to the extent that they have carried out obligations contemplated by the Basic Agreement', the Tribunal states:

28. This conclusion is perfectly in keeping with the spirit of the Basic Agreement which obviously wanted to give the contracting companies a great amount of flexibility in the designation of the companies which would assume responsibility, as witnessed by Article 13 of the Basic Agreement.

Furthermore, the Tribunal noted that 'the contractual relations between the Parties taken as a whole show that, although in an intermittent and sometimes not very coherent manner, the two companies named above [O.P.C. and H.I. Inc.] have participated in the carrying out of the undertakings with respect to the chain of hotels, for instance in the Agreement of June 14, 1968'.<sup>1</sup>

(iii) *Effective interpretation and good faith.* One fatal weakness of the Moroccan position should by now have become apparent, quite apart from its general formalistic character and its reliance on literal and strict interpretation. Although several of the objections reviewed above may seem *prima facie* impressive, or at least quite arguable, when seen in isolation, they appear in a different light when viewed as a whole. In the result, the Moroccan objections could with difficulty be reconciled with the facts, with the past attitudes of both parties and with common sense. It should be recalled here that the Government had conceded before the Tribunal that it was bound by the Basic Agreement and had intended to confer jurisdiction upon I.C.S.I.D. in respect of 'any dispute' relating to that Agreement. And the Government had not attempted to deny that the dispute referred to I.C.S.I.D. was covered by the arbitration clause. But it claimed that, for a variety of reasons outlined above, *none* of the claimants (signatories to the request for arbitration) was entitled to rely on the arbitration clause. In other words, while the Agreement itself and its arbitration clause were recognized as valid and binding on Morocco, and while there existed admittedly a 'dispute' arising out of the performance of the contract, the result of the Moroccan argument was the absence of *any* (non-Moroccan) party to that dispute or, at least, of any party entitled to request arbitration. Attempting to make this rather striking result seem more acceptable, the Government had insisted (1) that there was nothing unusual in a valid jurisdictional clause being ineffective while the rest of

<sup>1</sup> Evidence had been produced showing that, on both sides, 'realism' had frequently prevailed over juridical form: e.g. the Moroccan authorities had often, and quite understandably, addressed official communications to the parent companies rather than to the actual signatories to the Basic Agreement.

the contract is severable and remains binding<sup>1</sup> and (2) that this would not mean the absence of all legal control, since the performance of the contract would still be subject to the authority of 'municipal courts of competent jurisdiction'.<sup>2</sup>

Taken as a whole, the Moroccan interpretation of both the Washington Convention and the Basic Agreement could be and was in fact opposed by two, independent, answers: i.e. the principle of 'effective interpretation' and the principle of good faith. Before turning to each of these principles and outlining their application to the present instance, however, a preliminary question should at least be raised: in claiming as it did that none of the claimants was entitled to invoke the arbitration clause contained in Article 14 of the Basic Contract, was the Moroccan Government really objecting to the jurisdiction of the Tribunal? Or was it doing something else, for instance questioning the *locus standi* of the claimants or, possibly, the admissibility of their respective requests for arbitration? In other words, what was the correct juridical characterization of the Moroccan objections?

The claimants had raised the question, but merely in passing and they chose not to press the point. The Government made it quite clear that it was not raising an objection to admissibility<sup>3</sup>—which could, though preliminary, be considered as part of the defence on the merits—but that it was challenging the existence of the Tribunal's power, not the right of the various applicants to invoke it. Without pursuing the matter further here, doubt may still be expressed on the correctness of this view, having regard in particular to the—conceded—fact that there *was* consent by the Government to jurisdiction over the dispute, although, in the Moroccan view, none of the claimants was entitled or qualified to invoke this consent, because they failed to meet the Convention's criteria and, therefore, could not be 'parties to the dispute'.<sup>4</sup>

(a) *The principle of effective interpretation.* The Government had

<sup>1</sup> The idea of 'severability' or 'autonomy' of the arbitration clause in an international contract is generally recognized and resorted to *in favorem validitatis*, i.e. in order to 'save' the validity of the clause—in accordance with a (presumed) common intention of the parties—when the validity of the contract is otherwise questioned. Here the Government's argument used the concept of severability *in favorem invaliditatis*.

<sup>2</sup> Although the Government did not specifically say so, this could hardly mean anything other than the courts of the Moroccan State, party to the dispute. It may be recalled here that the Basic Agreement, not content with providing for *international* arbitration, specified that 'the forum of jurisdiction shall be outside of the countries of the contractual Parties'. As will be shown later, even after the Arbitration Tribunal had affirmed its jurisdiction, the Government attempted to insist on the jurisdiction of the Moroccan courts.

<sup>3</sup> In French, *fin de non-recevoir*. On the difference between international law and municipal law regarding the classification of objections, and on the little relevance of municipal law analogies, on this point, in international adjudication, see, e.g., the *Mavrommatis* case (*P.C.I.J.*, Series A, no. 2, p. 10) and the *Polish Upper Silesia* case (*P.C.I.J.*, Series A, no. 6, p. 19).

<sup>4</sup> On a somewhat similar 'objection to jurisdiction', cf. the second preliminary objection submitted by South Africa in the *South West Africa* cases (*I.C.J. Reports*, 1962, p. 319) which was, rather curiously, joined to the merits by the Court (cf. in particular dissenting opinion of Judge Morelli, pp. 564 et seqq., 569-70 and 573-4).



repeatedly emphasized that it had no desire to evade its obligations under the Washington Convention or under the Basic Agreement. However, total ineffectiveness of the arbitration clause followed inescapably from the Moroccan argument. On the claimants' side, it was strongly argued, hardly surprisingly, that such a consequence violated both common sense and recognized principles of interpretation, such as that of 'effective interpretation' (*ut res magis valeat quam pereat*).<sup>1</sup> The *international* character of the settlement of disputes was, as said above, of the essence of the contract, and, to paraphrase the Arbitral Tribunal in the *Lena Goldfields* case,<sup>2</sup> it may be said that the American Group (i.e. H.I. Inc. and O.P.C.) would not have concluded the contract without an international arbitration clause. Furthermore, if the I.C.S.I.D. arbitration clause should be found invalid or ineffective, the consequence would *not* be, as claimed by the Government, the competence of municipal, i.e. Moroccan, courts. The Agreement (of 15 October 1966) ('Letter of Modification'), which had immediately preceded the 'Basic Agreement' and had been signed by Morocco and by H.I. Inc. and O.P.C., provided that:

*any dispute arising in connection with the Letter of Intent of 28 September 1966, this Letter of Modification and the formal contract to be concluded shall be finally settled under the Rules of Conciliation and Arbitration of the ICC.*<sup>3</sup>

If H.I. Inc. and O.P.C. were to be considered (following the Government's contention) as 'third parties' under the Basic Agreement, the two American companies would certainly be entitled then to rely on the arbitration clause of 15 October 1966, and the dispute would have to be submitted to the 'Court of Arbitration' of the International Chamber of Commerce.

Morocco insisted on the 'novel character' of the Washington Convention, on the carefully drafted safeguards inserted into it to protect the signatory States and, last but not least, on the need for restrictive interpretation of a State's undertaking to arbitrate, seen as a 'derogation' from its sovereignty.

Whatever the relevance of those various ideas (the last one of which, at least, is submitted to be very doubtful), one difficulty remained: how could the defendant Government satisfactorily explain a line of defence which—out of a series of agreements recognized as valid, and partly performed over the years—singled out one clause (Article 14, the arbitration clause) in order to deprive it of effect by the successive exclusion of all non-Moroccan parties (and of all Moroccan companies)?

From the preceding summary of facts and discussion, one point should by now be abundantly clear: the Moroccan Government had wanted from the

<sup>1</sup> Cf., e.g., the cases of *Acquisition of Polish Nationality* (P.C.I.J., Series B, no. 7, pp. 16-17), *Exchange of Greek and Turkish Populations* (P.C.I.J., Series B, no. 10, p. 25) and *Interpretation of Peace Treaties* (I.C.J. Reports, 1952, p. 229).

<sup>2</sup> Cited above at p. 149 n. 2.

<sup>3</sup> Italics added.

start to deal *with the Group Holiday/Occidental*, without paying much attention to the administrative and formal set-up of companies within the Group. Official correspondence was addressed indistinctively to mother companies, to subsidiaries or to 'the Group'.<sup>1</sup> There was indeed hardly any doubt about the common and real intention of the parties, or about the real and constant intention of the Government (at least until after arbitration proceedings were instituted against it). As evidenced by a number of 'conclusive acts' throughout the history of the Project, it never was the intention of the Group, when adopting certain corporate structures in the course of performance of the Project, to increase their obligations towards the Government, nor (more importantly) was it ever the intention of the Government to derive additional rights or incur new obligations from the separate legal personality of parts or subdivisions of the H.I./Occidental Group.

This consideration—of the *spirit* of the agreements—is closely linked to a second and rather obvious argument put forward by the claimants:

(b) *The principle of good faith.* According to the claimants, the whole Moroccan argumentation was artificial and untenable, and an *ex post facto* theory in flat contrast to the common expectations of the parties and to the very attitude of the Government itself, until the arbitration began. The Government had no warrant to raise such formal objections and to rely on the separate juridical personality of the various claimants. To take one example, that of O.P.C.: how could the Government contend—while the Basic Agreement had been signed by O.P.C. on behalf of a subsidiary (to be created)—that neither O.P.C. nor the subsidiary was entitled to rely on the arbitration clause, the former because it had not signed the Agreement (in its own name) and the latter because it did not exist at the time of signature? How could such a interpretation be reconciled with the *spirit* of the agreement (not to mention its letter) and with the principle of good faith? How could such a contention be put forward by a party which, by its whole attitude, its signature under several contractual texts, its correspondence, etc., had clearly represented that it was dealing and wanted to deal with the *Group Holiday/Occidental*?<sup>2</sup>

Not unexpectedly, the Arbitral Tribunal, in its decision of 1 July 1973, refrained from commenting on the compatibility with the principle of good faith of the Moroccan system of preliminary objections. But it rejected the objections in no uncertain terms, fully recognizing that Holiday Inns Inc. and Occidental were parties, although not named as such in the Basic Agreement. After stating, as already mentioned, that the two companies had warranted the performance of the Basic Agreement and carried out obligations contemplated by it, and therefore were entitled

<sup>1</sup> Certain additional agreements, e.g. of 5 September 1970 and the *Protocole d'Accord* of 26 October 1970, expressly bound the Government to the '*Groupement H.I./Occidental*', etc.

<sup>2</sup> On estoppel, its various forms and its relation to the principle of good faith, cf. in particular Bowett, loc. cit., at p. 184, and Martin, op. cit., pp. 304 et seqq. (cited above, p. 145 n. 4).

to invoke the arbitration clause, the Tribunal emphasized in two sentences cited above,<sup>1</sup> the 'flexibility' of the contractual set-up in the designation of the various companies concerned and the need to consider and take 'as a whole' the contractual relations between the parties. This was undeniably in keeping 'with the spirit of the Basic Agreement' as well as, it may be added, in keeping with a practical and business-like approach.

That the Tribunal's decision on the Moroccan objections was sound, on both legal and equitable grounds, is scarcely a matter for doubt, it is submitted. The fact remains, however, that the claimants 'lost' about a year and a half before they were able really to present their case to the Tribunal. So the question should perhaps be raised whether some at least of these objections might not have been avoided by more careful legal drafting of the relevant agreements. On this point also, the first 'World Bank arbitration case' may offer valuable lessons to negotiators, whether they are on the side of States or of private investors. Another question, of some interest to legal practitioners in arbitration, is whether, in retrospect, the Government was really wise in raising such a wealth of preliminary objections, and of such a nature; but such 'tactical questions', it must be admitted, are easier to answer *in abstracto* than in the concrete circumstances of a case, with its many constraints, of time in particular.

However this may be, the decision of 1 July 1973 did not put an end to the discussion of preliminary issues between the parties. If the claimants and/or the Arbitral Tribunal had thought that the decision had settled, once and for all, all problems of jurisdiction in the 'Moroccan arbitration', they were mistaken. The defendant Government<sup>2</sup> was to raise a number of additional jurisdictional objections, based mainly on the 'loan contracts' which, as mentioned above, had been concluded on the local level between the H.I.S.A. companies and the 'Moroccan specialized agency', the C.I.H.<sup>3</sup>

## VI. FURTHER MOROCCAN OBJECTIONS: INTERNATIONAL AND NATIONAL JURISDICTIONS

After the decision of 1 July 1973, the Moroccan Government raised, in its rejoinder, several other objections to the jurisdiction of the Arbitral Tribunal and/or to the admissibility of the claims connected with the loan contracts. The Government claimed that the Moroccan courts had sole jurisdiction to decide issues concerning the loan contracts and that such matters 'should not be heard by the Arbitration Tribunal until . . . decided by the Moroccan Courts at the suit of the interested parties'. Then, and

<sup>1</sup> From the filing of the request for arbitration, end of December 1971, to the date of the decision of 1 July 1973.

<sup>2</sup> In its rejoinder, of 14 December 1973, following the claimants' reply of 14 September 1973.

<sup>3</sup> Cf. above, p. 130 and n. 2.



only then, could the Arbitration Tribunal consider the effect of the Moroccan decisions upon the obligations arising from the Basic Agreement (between the parties to the arbitration).

In order to appreciate fully the meaning of these new objections, some facts, already mentioned, should be kept in mind:

(a) In its decision of 1 July 1973, asserting its jurisdiction, the Tribunal had held that the H.I.S.A. companies were *not* 'parties to the present proceedings before ICSID' but had, wisely, reserved the right to take their situation 'into account when judging the performance of the obligations which the Agreement of December 5, 1966 and the additional agreements . . . have created' for the parties.

(b) Under the 'Basic Agreement' (of 5 December 1966), the Government had to provide financing for the construction of the hotels, and this had been done, for a variety of technical reasons, by means of separate loan contracts executed, following local standard forms, by the 'Crédit Immobilier et Hôtelier' (C.I.H.) with four separate H.I.S.A. companies, wholly owned subsidiaries created by the claimants at the request of the Government.<sup>1</sup>

(c) These contracts between lender and borrower, like all similar contracts of the C.I.H., contained a standard 'choice of forum' clause.<sup>2</sup>

The opportunities offered in the arbitration proceedings by such a remarkable set of facts (which had, at the time, interested or worried no one) were not lost on the defending Government and its galaxy of advisers.<sup>3</sup> It could not be denied that the loan contracts (i) made no reference whatever to international arbitrations or to I.C.S.I.D. and (ii) contained a valid 'choice of forum' clause in favour of the Moroccan courts. Furthermore, in three out of four cases,<sup>4</sup> the loan contracts were, at least in form, not 'international' at all being executed between a 'Moroccan specialized agency' and Moroccan companies, and relating to obligations to be performed in Morocco. Not only the parties to the loan contracts, but also the parties to the arbitration, had undoubtedly consented to the signing of the loan contracts (including the clause conferring jurisdiction on the local courts). Quite apart from this express consent, general principles of Moroccan private international law<sup>5</sup> on jurisdiction would (assuming that the contracts were considered as 'international') have led

<sup>1</sup> Cf. above, p. 130 and n. 2; in fact, one of the loan contracts had been executed with H.I. Glarus and not with a H.I.S.A. company.

<sup>2</sup> Article 23: 'Election of domicile'; the clause specified that it purported to be a 'choice of forum'!

<sup>3</sup> The Government's very distinguished team of counsel, English, French and Moroccan, included Sir Elwyn Jones (as he then was)—for an early part of the proceedings—, Professor M. Virally, Messrs. A. Lester, Q.C., M. Mendelson and D. Hodara. The claimants were represented by Messrs. P. Lalive and R. Budin, of the Geneva Bar, and Mr. M. E. Schneider.

<sup>4</sup> See above, p. 130 n. 2.

<sup>5</sup> Cf. Article 42 (1) of the 1965 Convention, which provides that, in the absence of agreement by the parties as to the applicable 'rules of law', 'the Tribunal shall apply the law of the Contracting State party to the dispute (*including its rules on the conflict of laws*) and such rules of international law as may be applicable' (emphasis supplied).

to the jurisdiction of the Moroccan courts, those of the *situs*, of the place of performance and of the place of contracting (not to mention the nationality of at least one of the parties and their common domicile).

On top of these various arguments, the Government mentioned the—equally indisputable—fact that the main claims put forward in the request for arbitration were related to a cessation of the loan payments. Furthermore, it was contended that the Tribunal would act against the principles of natural justice if it did not abstain from deciding on the merits the issue of performance of the loan contracts, since neither the C.I.H. nor the H.I.S.A. companies were parties to the arbitration and in a position to defend their rights.

While none of the above-mentioned contentions is unanswerable, they should not and could not be under-estimated. How the claimants attempted to counter them will be shown below but one further argument of the defendant should be cited which, for good measure, the Government thought it advisable to add to an already long list of objections:<sup>1</sup> Article 5 of the Basic Agreement provided that 'The Government *will lend*' to the Group H.I.-Occidental a certain sum 'in the form of a first mortgage loan through specialized Moroccan agencies . . .'. It was contended that this clause meant that the Government would facilitate or procure the conclusion of a loan contract!

This bold contention met with a sharp rebuke from the Tribunal who, after dealing with the other Moroccan objections, deemed it necessary to state explicitly . . . that it does not accept the thesis of the Government of Morocco that the latter's obligations to lend for the construction of the hotels was [sic] completely discharged by the conclusion of the loan contracts between the HISA companies and the CIH.<sup>2</sup>

The Government's contention may well appear disingenuous but it was in the logic of its general approach to the case—an approach which tended, so to speak, to displace the emphasis from the *international* to the *national* level, to bring to the foreground the C.I.H. and the H.I.S.A., the loan contracts and the Moroccan courts. As stated by the Tribunal (in its decision of 12 May 1974), because of the objections raised by the defendant, 'the jurisdiction of the local courts and of the Arbitral Tribunal, respectively, was thus put in issue'.

As a matter of fact, the Moroccan objections raised a more general problem than that of the relationship between local courts and an international tribunal. They raised the question of the whole relationship, and hierarchy, of norms (local, i.e. Moroccan, and international), of contracts (loan contracts and Basic Agreement), of persons (H.I.S.A.—C.I.H., on the one hand, claimants and defendant, on the other). In the

<sup>1</sup> With the benefit of hindsight, one may wonder whether adding this last argument was not, perhaps, a tactical mistake, since it was likely to create a 'credibility gap' in the minds of the Arbitrators.

<sup>2</sup> Decision of 12 May 1974, p. 5.

nature of things, whenever an investment project is carried out on the basis of an international contract as in the present instance, it will lead in many, and perhaps in most, cases, 'inevitably to the creation of a juridical person of local law'<sup>1</sup> or at least to the execution on the local level of other legal acts, such as contracts, in the course of implementing the 'project' and the main agreement.

The *Holiday Inns* arbitration is of particular interest here because it offers an excellent illustration of the type of confusion and of conflict which is so apt to arise in the domain of international investments.<sup>2</sup> This is the reason why fairly large excerpts from the Tribunal's decision (of 12 May 1974) will be quoted here—a decision of admirable firmness and clarity which deserves to be widely known and kept in mind by international negotiators.

As might be expected, the claimants had emphasized the *international* character of their relationship with the Government. In their opinion, the Moroccan thesis amounted to a perverse reversal of the natural hierarchy of norms, agreements and institutions: (a) the loan contracts were but a means to an end, a method of implementing the international contract, and had a subordinate character; (b) similarly, the choice of forum clause in the loan contracts could not prevail over the I.C.S.I.D. arbitration clause contained in the 'Basic Agreement' of 1966 and could not possibly 'limit the jurisdiction of the Arbitral Tribunal'.

In passing, it may also be mentioned that the claimants strongly resisted one of the Government's arguments in favour of a restrictive interpretation of its undertaking to arbitrate, an argument which, though stale and exploded, strangely keeps cropping up again and again in similar arbitrations: this undertaking should be interpreted narrowly—it was argued—as a 'derogation' from or an 'alienation' of the sovereignty of the State! The answer is well known: by ratifying the 1965 Washington Convention and agreeing, in the Basic Agreement, to I.C.S.I.D. arbitration, Morocco had *exercised* its sovereignty and not 'alienated' it!<sup>3</sup>

The claimants appear to have been on an equally firm ground when pointing out the practical, and unacceptable, consequences of the Moroccan submissions; these would have rendered largely ineffectual the arbitration clause and the international obligations of Morocco under the Washington Convention.<sup>4</sup> It was hardly conceivable that the Arbitral

<sup>1</sup> Cf. P. Reuter, 'Réflexion sur la compétence du CIRDI . . .', in *Investissements étrangers*, op. cit. above (p. 123 n. 3).

<sup>2</sup> Another example of this type of conflict can be found in the second 'World Bank Arbitration', *Adirano Gardella S.p.A. v. Ivory Coast Government* (ARB/74/1), where the defendant was inclined at one stage to rely on the by-laws of a local 'joint venture' created by the parties, in order to minimize or obliterate the international character of its obligations.

<sup>3</sup> Cf. the award given by Professor R. J. Dupuy, in the *Texaco-Calasiatic v. Libya* case, of 19 January 1977, in 53 I.L.R. 422 and *Clunet*, 104 (1977), p. 350 at no. 77: 'The contract which the State entered into with a private party cannot be viewed as an alienation of such sovereignty, but as a limitation, partial and limited in time, of the exercise of sovereignty.'

<sup>4</sup> The claimants relied, *inter alia*, on Article 25 (1), last sentence: 'When the parties have given their



Tribunal should, as suggested, suspend or stay the proceedings (*sursis à statuer*) until a decision was rendered by the Moroccan courts and that, in such an event, it could only examine the possible effects of such Moroccan decisions on the rights and obligations of the parties to the international arbitration. Such a theory left the Arbitral Tribunal with only a kind of residual jurisdiction, contrary to the arbitration clause (Article 14 of the Basic Agreement) and to the system of the Washington Convention. Moreover, the Government's contentions attempted to reintroduce by the back door the condition of exhaustion of local remedies—which Morocco had not required when ratifying the Convention.<sup>1</sup>

The Arbitral Tribunal based its closely reasoned decision on 'certain general principles which have inspired the Convention of Washington' and which had been referred to by the parties, i.e. 'the general unity of an investment operation, respect for the sovereignty of States' and the principle that 'international proceedings in principle have primacy over purely internal proceedings'.

On the first point, the Tribunal is particularly explicit:

It is well known, and it is being particularly shown in the present case, that investment is accomplished by a number of juridical acts of all sorts. It would not be consonant either with economic reality or with the intention of the parties to consider each of these acts in complete isolation from the others. It is particularly important to ascertain which is the act which is the basis of the investment and which entails as measures of execution the other acts which have been concluded in order to carry it out.

There was no doubt that, in the present case, the contract of 5 December 1966, called by the parties the 'Basic Agreement', was, together with its various supplements, the '*charter of the investment*', of which the loan contracts were a 'measure of execution'. It was only natural, therefore, that certain fundamental provisions were equally valid for the loan contracts: on the other hand, certain aspects of the loan contracts could be 'isolated' and considered as outside the scope of the Basic Agreement; questions 'affecting the indirect or secondary aspects of the investment'—to use the Tribunal's language—could properly fall within the jurisdiction of the local courts (even when the host State had *not* made a reservation concerning the exhaustion of internal remedies)<sup>2</sup> and 'in this way State sovereignty is observed'.

With regard to the first aspects (i.e. non-secondary, and common to the 'charter of the investment' and to the loan contracts), the Tribunal

consent, no party may withdraw its consent unilaterally', and they contended that the Government's position amounted to such withdrawal in practice.

<sup>1</sup> Cf. Article 26 of the Convention: 'Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration *to the exclusion of any other remedy*. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention' (emphasis added).

<sup>2</sup> Cf. Article 26, cited in the previous note.

addressed itself to the possibility<sup>1</sup> that the Moroccan courts could, 'on the initiative of one of the parties to a loan contract, be faced with questions which the Arbitral Tribunal for its part would equally be called upon to decide'. Its answer is crystal clear and deserves to be quoted in full:

In such a hypothetical situation the Moroccan tribunals should refrain from making decisions until the Arbitral Tribunal has decided these questions or, if the Tribunal had already decided them, the Moroccan tribunals should follow its opinion. Any other solution would, or might, put in issue the responsibility of the Moroccan State and would endanger the rule that international proceedings prevail over internal proceedings.

Any other solution, it may perhaps be added, would have jeopardized the credibility of international arbitration and the future of the whole I.C.S.I.D. system in particular. It may, of course, be hoped that negotiators of international investment projects will succeed in ensuring, through more adequate drafting, that similar problems do not arise in the future. However, experience hardly justifies much optimism in this respect: lawyers often have too little or too late a say in the decision-making process on important international contracts, and arbitration or choice of law clauses are often regarded by them as requiring no particular skill or attention. Needless to say, the resulting cost may be substantial.

A last, procedural, aspect of this phase of the dispute may be mentioned: it had been alleged by the claimants that the new Moroccan objections were not admissible, since they purported to bypass or indirectly annul the effects of the Tribunal's decision of 1 July 1973. They stressed what they described as the dilatory character of the new objections and insisted that the Tribunal had decided it had jurisdiction; such decision necessarily applied to the entire dispute between the parties and could thus no longer be called into question.

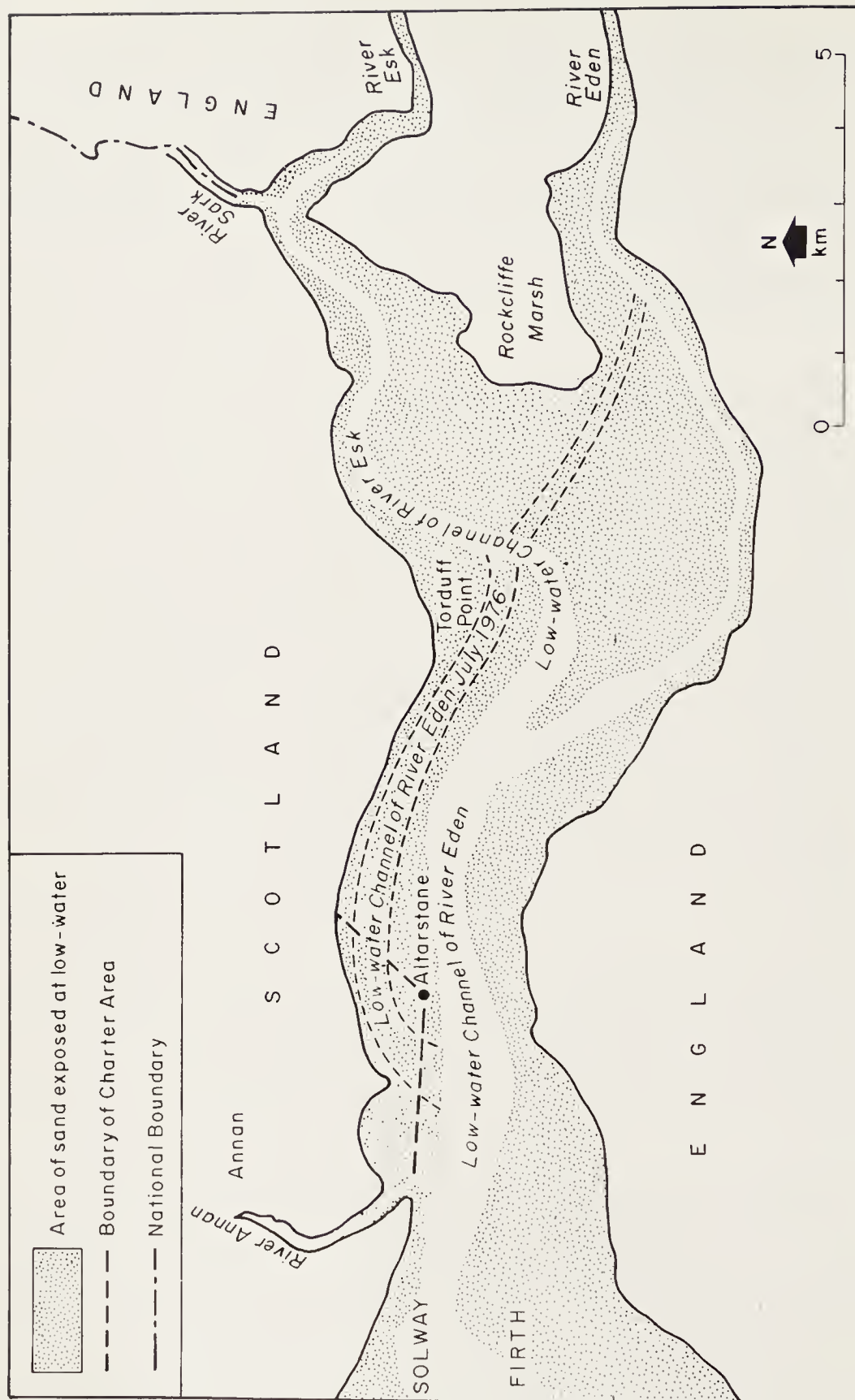
In keeping with the tendency of many international tribunals, the Arbitral Tribunal avoided any pronouncement which might be construed as a criticism of the Government's attitude as well as any formalistic stand based on purely procedural grounds. It contented itself with adding, at the end of its award, the somewhat enigmatic statement that the preceding considerations constituted 'a natural development' of its previous decision on jurisdiction.

To conclude, the above survey of some legal aspects of the *Holiday Inns-Occidental v. Morocco* case does not, and cannot, purport to be exhaustive. A book would hardly suffice if one had to analyse the numerous juridical problems—not to mention political and psychological aspects—which arose in this case, and which are so apt to arise in the course of implementing many investment projects or international contracts.

<sup>1</sup> It should be remembered that the Moroccan courts had not in fact been called upon to intervene at the time arbitration proceedings were instituted (except as regards interim measures of protection).

Necessarily selective, the present study, centred as it is on jurisdictional issues, does not permit, in itself, even a tentative judgment on the merits or demerits of the I.C.S.I.D. arbitration system and procedure. But it may serve at least to indicate to the practitioners of international trade, whether private investors or State negotiators, the need for great caution when establishing and drafting the 'juridical architecture' of a vast international project.





# THE BOUNDARY BETWEEN ENGLAND AND SCOTLAND IN THE SOLWAY FIRTH\*

By COLIN WARBRICK<sup>1</sup>

THE establishment of the boundary between England and Scotland when the two countries were separate States was a protracted and uncertain business. The boundary moved with military success and defeat and, even when it was apparently stable, its demarcation was never easy. Quite apart from national military operations in the border areas, a wild anarchy often prevailed as private adventurers carried out raids across the border for the purpose of mere personal aggrandisement.<sup>2</sup> Now, although the whole of the land boundary has never been authoritatively laid down and is not marked on the ground, the borderline is tolerably clear and is marked in consistent agreement on the maps. However, one part of the boundary is not only not demarcated but there is no agreement as to the definition of borderline.<sup>3</sup> This is the continuation of the land boundary westwards into the Solway Firth, a matter of importance at least as far as the closing line of the Firth and three miles beyond.

The land boundary terminates where the river Sark enters the Firth, the boundary there being the *medium filum* of that river (see map, opposite). From Sark mouth for a distance of about ten miles, the English and Scottish shores at high water run approximately parallel, about one and a quarter miles apart, until the English coast turns sharply south-westwards and the Firth opens out into the Irish Sea. The Solway is fed by several rivers, both English and Scottish, notably the Esk and the Eden. For most of its length the Esk lies in Scotland or forms the boundary between England and Scotland, but it enters the Solway to the English side of the Sark. The Eden lies wholly in England and it joins the Solway about two miles south of the Esk. In the narrow part of the Firth the Esk and the Eden cut narrow channels, separately at first and then running in a common path, which are exposed at low tide. These channels in the bed of the Firth are liable to move their course, sometimes quite dramatically in

\* © Colin Warbrick, 1981.

<sup>1</sup> M.A., LL.B. (Cantab.), LL.M. (Michigan); Lecturer in Law, University of Durham. This research has received generous financial assistance from the Research Fund of Durham University. The author is pleased to acknowledge the inestimable assistance he has received while considering this problem from Mr. William McKenna, Solicitor of Carlisle.

<sup>2</sup> Ridpath, *The Border History of England and Scotland* (rev. edn., 1848); Mack, *The Border Line* (1926).

<sup>3</sup> 'Boundary' or 'borderline' will be used to indicate the line which divides one territorial entity from another. Boundaries are 'defined' by an authoritative decision (e.g. treaty) or process of decision (practice). When they have been defined, they may be 'demarcated' by being marked on the ground. See Prescott, *Frontiers and Boundaries* (2nd edn., 1978), ch. 1.

a single tide.<sup>1</sup> The shore lines at the high-water mark are relatively stable, although the land has been encroaching on the Firth at its eastern end at Rockcliffe Marsh for many years.<sup>2</sup>

Once the channels of the Esk and the Eden merge, they usually flow in a single channel, more or less mid way between the English and Scottish shores at high water, until it reaches a point beyond which the narrow part of the Firth extends, when the channel divides and eventually disappears altogether. In July 1976 the Eden channel migrated northwards and, after its confluence with the Esk, flowed along the Scottish coast, close inshore until it met the channel of the river Annan, when it resumed its more normal, central path. This accident of the shifting sands resurrected a matter which had been dormant for many years: it made the question of the border in the Solway a matter of active concern to the bodies having responsibility for fishing activities in the Firth.

In England, the regulation of fisheries in the Solway area is the responsibility of the North West Water Authority, one of the regional authorities for England and Wales set up under the Water Act 1973. The authorities are public bodies with members appointed by the Secretary of State for the Environment, the Minister of Agriculture, Fisheries and Food and local authorities.<sup>3</sup> The authorities are successors to the river authorities and are responsible, *inter alia*, for the control of fisheries under section 28 of the Salmon and Freshwater Fisheries Act 1975. The area of jurisdiction of the North West Water Authority is defined by the North West Water Constitution Order 1973<sup>4</sup> which, in its turn, makes reference to the boundaries of its predecessor authorities, of which the Cumberland River Authority (Seaward Boundaries of Area) Order 1964<sup>5</sup> applies to the Solway. The seaward boundaries of the water authorities for fishing purposes are defined as including

those tidal waters and parts of the sea adjoining the coast of the water authority area to a distance of six nautical miles measured from the baselines from which the breadth of the territorial sea is measured.<sup>6</sup>

This includes the waters of the Solway Firth but none of the statutes nor any of the Orders make provision for the seaward limitation of the North West Water Authority's area between England and Scotland. The Salmon and Freshwater Fisheries Act, however, only applies to Scotland in certain specific instances,<sup>7</sup> and it is clear that the Authority has no jurisdiction in Scotland, including the Scottish part of the Firth.

<sup>1</sup> *Report of the Solway White Fishery Commission* (1892), C. 6789: 'The line of demarcation between the two jurisdictions is nowhere physically defined; mid-channel is a shifting definition; what constitutes it this year may be hundreds of yards to the north or south of it next year.'

<sup>2</sup> Neilson, *Annals of the Solway until 1347 A.D.* (reprint, 1974), pp. 23-5; Steers, *The Coastline of Scotland* (1973), pp. 116-19.

<sup>3</sup> Water Act 1973, s. 3.

<sup>4</sup> S.I. 1973, no. 1287.

<sup>5</sup> S.I. 1964, no. 1501.

<sup>6</sup> Water Act 1973, Sch. 2, para. 4 (1) as amended by the Fishery Limits Act 1976, Sch. 2, para. 19.

<sup>7</sup> S. 39.



On the Scottish side, matters are more complicated because the area within the Solway does not fall under a single authority, nor are the rights to fish on the Scottish side wholly public rights, as they are in England.<sup>1</sup> Control of the fishings is vested in District Boards,<sup>2</sup> of which there are two for the narrow part of the Solway, those for the Annan and the Nith. Although these Boards are public bodies, representation on them is restricted to representatives of those who hold the private rights to the fishings, both on the coast and higher up the rivers.<sup>3</sup>

In common with the other Scottish District Boards, no seaward limit is specified to the authority of the Annan and Nith Boards. A common estuarial limit for the Annan, Esk and Nith was defined by the 1868 Act as being confined by a line from Skinburness to Carsethorn House,<sup>4</sup> so to that extent there is a limit to the authority of the Annan and Nith Boards, but there is no indication of how far that authority stretches in the direction of England. In addition, there are proprietary rights in sea fisheries for salmon, held by grant or lease from the Crown in Scotland, the boundaries of which are variously defined, although again none addresses itself to the outer limit towards England.

The Solway is no stranger to fishing disputes. At the time when England and Scotland were separate States, these conflicts were of an international character, with Scotland's commercial interests being ranged against the more casual concerns of the English. More importantly, because the upper reaches of the Firth and some of the rivers which flow into it were from time to time in English hands,<sup>5</sup> and because it was not possible to obtain English co-operation in regulating the manner of fishing,<sup>6</sup> the Scots were prepared to allow their fishermen lower down the Firth to engage in fishing methods, especially the use of fixed nets, which seriously interfered with the progress of salmon to the rivers and which were not permitted elsewhere in Scotland.<sup>7</sup>

Even in more settled times there have been conflicts between sporting and commercial interests, between the rodmen and the riparian owners on the rivers and the professional fishermen in the Firth,<sup>8</sup> which arose in both England and Scotland. Beyond this there were rivalries between various groups of professional fishermen, between the mobile fishermen using boats or walking with their haaf-nets and those working devices fixed in the bed of the Firth, stake or poke nets.<sup>9</sup> There were confrontations

<sup>1</sup> See below, pp. 167-8.

<sup>2</sup> Salmon Fisheries (Scotland) Acts 1862, 1868.

<sup>3</sup> Salmon Fisheries (Scotland) Act 1862, s. 18.

<sup>4</sup> Salmon Fisheries (Scotland) Act 1868, Sch. B.

<sup>5</sup> *Oswald v. McWhirter*, (1835) 1 Sh. and Mc. 393.

<sup>6</sup> Tait, *The Law of Scotland relating to Game, Trout and Salmon Fishing and Sea Fisheries* (2nd edn., 1928), p. 220.

<sup>7</sup> Act anent cruives and zaires, 1563.

<sup>8</sup> *Murray v. Earl of Selkirk and Magistrates of Kirkcubright*, (1824) 2 Shaw's App. 299; *Johnson v. Mackenzie*, (1869) 6 S.L.R. 727.

<sup>9</sup> *Royal Commission on the Fisheries of the Solway* (1896), C. 8182. For an explanation of the various fishing techniques, see *Report of the Committee on Salmon and Freshwater Fisheries* (Bleddisloe), Cmnd. 1350.

between white fishermen and red, those who fished for herring and cod and those who fished for salmon.<sup>1</sup> But, all the time, another strand cut across these arguments which divided all Scottish fishermen of whatever technique from all English fishermen. It resulted from the different legal basis for fishing in England and Scotland and the quite separate and inconsistent rules as to how the fishing should be conducted on each side of the Firth. Seasons, close times and mesh sizes were different in the one country from those in the other.

The Solway Act 1804 laid down a common regime for fishing in the Firth, but throughout the nineteenth century this scheme gradually disintegrated. First the Annan Act 1841 provided special rules for the river Annan and its estuary and gave unique enforcement powers to the Burgh of Annan. Then, as a result of the Salmon Fisheries Act 1861, the whole of the English side of the Firth was subjected to a new scheme of regulation.<sup>2</sup> One result of this Act<sup>3</sup> and the Salmon Fisheries Act 1865<sup>4</sup> was that fishing by fixed engine disappeared from the English side of the Solway. Fixed engines as used in the Solway are great wooden constructions, sunk in the sea bed, protruding fifteen or sixteen feet above the sand and running perpendicularly to the shore for hundreds of yards, festooned with special nets. Commissioners appointed under the 1865 Act reviewed the authority to use fixed engines right round the English coast. They seem to have been strict about confirming privileges to continue to use fixed engines (in which they were supported by the courts)<sup>5</sup> and, on the English side of the Solway, no claims to use them were admitted. It was the intention that a similar review be carried out for the Scottish side of the Firth,<sup>6</sup> but the English Commissioners held that they had no authority to make investigations in Scotland. Instead, under a local Act,<sup>7</sup> Scottish Commissioners were appointed and they confirmed many rights to fish with stake nets, including those in the Charter area of the Burgh of Annan.<sup>8</sup> The result was that friction between fishermen across the boundary increased. Fishermen on the English side had lost their right to use fixed engines but had expected that the privilege would be denied equally on the Scottish side.<sup>9</sup> Fixed engines are the most effective way of fishing—they now take between 80 and 90 per cent of Solway salmon.

<sup>1</sup> *Gilbertson v. Mackenzie*, (1878) 5 R. 610.

<sup>2</sup> The attempt to provide a uniform regime foundered on the question of fixed engines: Leith, 'Salmon Legislation in Scotland' in Herbert, *Fish and Fisheries* (1882), p. 131.

<sup>3</sup> S. 11; the prohibition is retained in the Salmon and Freshwater Fisheries Act 1975, s. 6.

<sup>4</sup> Ss. 39-40.

<sup>5</sup> *Rawsthorne v. Backhouse*, (1867) L.R. 3 C.P. 67; *Holford v. George*, (1868) L.R. 3 Q.B. 639.

<sup>6</sup> Salmon Fisheries (Scotland) Act 1862, s. 33; *Mackenzie v. Murray*, (1881) 9 R. 186; *Phyn v. Kenyon*, (1905) 4 Ad. 528.

<sup>7</sup> Solway Commissioners Act 1877.

<sup>8</sup> The privileged fixed engines in the Solway are listed in Stewart, *A Treatise on the Law of Scotland Relating to Rights of Fishing* (2nd edn., 1892), pp. 556-8.

<sup>9</sup> For extensive accounts of the developments in Solway during the nineteenth century, see Stewart, *op. cit.* (previous note), ch. XVIII, and Herries, *The Solway Firth: the Laws affecting its Salmon Fisheries* (1892).

Towards the end of the nineteenth century the Solway fisheries were much investigated by commissions of one kind and another, whose usual recommendation was that a single regime be established, at least in the upper reaches of the Firth.<sup>1</sup> The Salmon Fisheries Act 1923 made provision for common regulation of the fishing, on the establishment by the Minister of Agriculture and Fisheries and the Secretary of State for Scotland of a Solway District Fishery Board.<sup>2</sup> An order creating the Board was never made.

Resolution of the issue has been intractable because of a fundamental distinction between English law and Scots law as to the nature of the right to fish for salmon in the sea. In England, below the point to which the tide flows up rivers, the right of fishing is a public right, similar to the right to navigate tidal waters, a right independent of any proprietary right, whether of the shore or of the sea bed.<sup>3</sup> Although the right may be conditioned by the requirement to hold a licence and subjected to conditions such as those for close seasons under statutory authority, the right cannot be alienated by the Crown (in its capacity as owner of the sea bed) nor, by prescription, by any individual.<sup>4</sup> The independence of the right to fish from any rights in the sea bed was underlined by the Privy Council in *Attorney-General for British Columbia v. Attorney-General for Canada*:

In tidal waters, whether on the foreshore or in creeks, estuaries and tidal waters, the public have the right to fish. . . . It will, of course, be understood that in speaking of this public right of fishing in tidal waters, their Lordships do not refer in any way to fishing by kiddles, weirs or other engines fixed to the soil.<sup>5</sup>

In England, licences to fish are issued by the Water Authority but the licence fee is in no sense a rental and confers no exclusive right to fish. Where limits are imposed, for example, on the number of licences issued or on the areas in which fishing may be undertaken, they are adopted for the purposes of conservation and not for the protection of existing licences. Fishing without a licence or fishing in breach of regulations laid down by statute or by Water Authority by-law is a criminal offence. Enforcement is in the hands of the Water Authority and the licensed fishermen have no role to play in the enforcement of the law, nor is any civil right of theirs infringed by illegal fishing.

The difference between English and Scots law does not result from any

<sup>1</sup> *Report of the Special Commissioners on the Effect of Recent Legislation on the Salmon Fisheries in Scotland* (1871), C. 419; *Report on the Laws affecting Salmon Fisheries of the Solway Firth* (1881), C. 2769; *Report of a Commission on the Solway White Fishery* (1892), C. 6798; *Report of the Royal Commission on the Fisheries of the Solway Firth* (1896), C. 8182.

<sup>2</sup> S. 84. By ss. (3), the Solway District Board would have no powers to prejudice any existing rights of fishing, including those by fixed engine.

<sup>3</sup> Hale, *De iure maris*, c. 4, in Hargrave, *A Collection of Tracts Relative to the Law of England* (1787); Oke, *Fishery Laws* (4th edn., 1924), ch. 1; Coulson and Forbes, *On Waters* (6th edn., 1952), ch. VI.

<sup>4</sup> Although a private right to a sea fishery may be established by ancient grant which dates back before Magna Carta. Cf. *Miller v. Little*, (1878) 4 L.R. Ir. 302.

<sup>5</sup> [1914] A.C. 153, 171.



difference in the Crown's rights to the bed of the sea<sup>1</sup> but arises because in Scotland the right of salmon fishing is among the *regalia minoria* of the Crown.<sup>2</sup> As an ancient feudal right, it is capable of alienation by the Crown to a subject by grant or by lease, the grantee or lessee having the exclusive right to fish for salmon in the area transferred to him. That exclusive right includes, in the Solway, the right to fish by fixed engine. The grantee or lessee takes a proprietary interest in the fishing and can protect his right by the civil remedies appropriate to trespass.<sup>3</sup> In addition, there is a territorially limited power of criminal prosecution for unlawful fishing, although in the Solway that limit of one mile from the low-water mark will generally be irrelevant.<sup>4</sup> On the Scottish side of the Solway, the Crown's rights to the fishing are leased or have been granted to various persons, including the Burgh of Annan (whose successor is the Annandale and Eskdale District Council).<sup>5</sup> The Burgh's rights were granted initially under the Charter of 1538 which was confirmed in similar terms in 1612. The sea boundaries of the Burgh, wherein lie its right of fishing, are defined thus: 'to the Moorbeck running to the sea, and from this to the Altarstane in Solway to the foot on Annan Water . . .'.<sup>6</sup> The Altarstane is about 1,100 yards from the Scottish shore (and is sometimes exposed by the movement of the sand) with the effect that the Burgh had the right to the fishing in a considerable area of the Solway, an area which is generally exposed at low tide and which lies to the north of the normal low-water channel of the Eden. The District Council grants tenancies to fish in this area and the fishing has been carried out by means of fixed engines, whose privileged status was confirmed by the Solway Commissioners in 1877. When the channel of the Eden moved over to the Scottish shore in 1976, one result was that a large part of the Charter area and some of the fixed engines fell south of the low-water channel. In the view of the North West Water Authority, they fell in England, because it was the Authority's contention that the boundary between the two countries was the mid-channel of the Eden, wheresoever that might for the time being be. The consequences of this claim were that English haaf-netmen were entitled to (and did) fish in areas claimed exclusively by the Annandale District Council, and the Water Authority considered taking action against the fixed engines, as being a means of fishing unlawful under English law.<sup>7</sup>

<sup>1</sup> On which see O'Connell, this *Year Book*, 45 (1971), p. 303 at pp. 365-8.

<sup>2</sup> Erskine, *An Institute of the Law of Scotland* (1871, ed. Nicholson), 2, 6.15; Stewart, op. cit. above (p. 166 n. 8), ch. VI; *Commissioners of Her Majesty's Woods and Forests v. Gammell*, (1851) 13 D. 854; (1859) 3 McQ. 419 (H.L.).

<sup>3</sup> *Johnson v. Morrison*, 1962 S.L.T. 322.

<sup>4</sup> Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951; Gordon, *Criminal Law of Scotland*, pp. 1044-54.

<sup>5</sup> Local Government (Scotland) Act 1973, Sch. 1.

<sup>6</sup> Charter by James V in favour of the Burgh of Annan, 1 March 1538; id., by James VI, 10 July 1612.

<sup>7</sup> It was thought possible that the fixed engines might have been lawful in England under the Salmon and Freshwater Fisheries Act 1975, s. 6.

The problem of the border and the divergent fishing laws which prevailed on either side of it had continued to be a source of friction between English and Scottish fishermen since the political attempts to solve it had foundered in the 1920s. The movement of the channel turned it into an active question of law.

At the present time, it is English haaf-netmen who are the most aggrieved by the different legal regimes on either side of the Solway. Not only do the fixed engines in Scotland take most of the fish, but Scottish haaf-netmen have a right to obtain a licence from the Water Authority to fish in England (and they do fish from the English shore at times when it is advantageous for them to do so) while the right to use haaf-nets in Scotland is conditional on holding a permit, a matter entirely in the discretion of the proprietors.

Before the North West Water Authority could decide whether to take any action against the operators of the fixed engines and before the District Council could initiate proceedings against the English netmen, the Eden returned to a course south of the Charter area in January 1977. None the less, the District Council went on with a civil action in the Outer House<sup>1</sup> asking for a declarator that

[the Charter area] is Scottish territory, and will remain Scottish territory regardless of the course of the River Eden, and, as such, outwith the jurisdiction of the defenders as Water Authority for *inter alia* the coastal areas which lie to the south of the Solway Firth,

and for an interdict prohibiting the Water Authority from exercising its powers in the Charter area.<sup>2</sup> The District Council did not specify a borderline but simply claimed that, wherever the boundary was, it always fell south of the Charter area, a contention which is effectively compatible only with a fixed borderline, the middle line of the estuary drawn between opposite coasts (or from the opposite high-water marks). In the absence of dramatic changes in the configuration of the shore-line, such a boundary would always be south of the Altarstane, and the Charter area would then always be in Scotland. The Water Authority did identify a boundary. It said that

The boundary between England and Scotland in the Solway to the south and south-east of the Burgh of Annan is the *medium filum* as exposed at low tide of the main channel of the River Eden, wherever it may be for the time being.<sup>3</sup>

Although the *medium filum* is nowhere exactly defined (and it is a concept primarily of municipal private law),<sup>4</sup> the practical circumstances of the

<sup>1</sup> *Annandale and Eskdale District Council v. North West Water Authority* (the *Solway* case), 1979 S.L.T. 266.

<sup>2</sup> On 11 February 1977 the District Council was refused an interim interdict against the Water Authority.

<sup>3</sup> *Solway* case, p. 267

<sup>4</sup> And one on which English and Scots law seem to be in agreement: Coulson, *op. cit.* above (p. 167 n. 3), pp. 112-18; Stewart, *op. cit.* above (p. 166 n. 8), pp. 136, 143.

Solway require this to be the line of deepest water rather than the geographical line of equidistance, comparable to the thalweg rather than used in contrast to it, as is usually the case.<sup>1</sup>

There were two preliminary matters to be decided. First, the Water Authority had to decide whether to submit to the jurisdiction of the Scottish courts and defend the action there. The argument that it ought not to do so was based on the claim that the Scottish courts had no jurisdiction in this matter but that, if the jurisdictional issue were taken and the court rejected the Authority's contention, then the Water Authority might be fixed with any subsequent finding by the court on the substantive issue, on the authority of the decisions in *Harris v. Taylor*<sup>2</sup> and *Henry v. Geopresco International Ltd.*<sup>3</sup> The declarator would not have been enforceable in England under the Judgments Extension Act 1868 but it might have enabled the District Council to raise an estoppel against the Water Authority if proceedings raising the matter later came on in England. Apart from any procedural defects in the service of the writ (which were not present here), the Water Authority could not make any plea to jurisdiction which did not raise the merits of the action, so that its appearance would bring it within the *ratio* of *Geopresco*.<sup>4</sup> However, the Water Authority did choose to defend the action and raised no preliminary objection to the jurisdiction of the Outer House.

The other matter which had to be disposed of was whether the issue raised by the District Council was hypothetical, the channel having returned south of the Charter area. Professor Walker has written that 'It is not always easy to say when a question is hypothetical',<sup>5</sup> and so little is understood about the reasons for the movement of the river channel that the court's dilemma was made doubly difficult. Lord Dunpark decided that there was a real risk, not merely a wholly contingent possibility, of the channel's reverting northwards (the evidence was that it had last taken such a course in 1942). In this eventuality, the Water Authority would seek to exercise its rights in the disputed area. Accordingly, the judge held that the sensible course would be to decide the issue in this action so that both parties would be properly instructed for all times as to the extent of their rights as now constituted.<sup>6</sup>

To anticipate the outcome of the case, Lord Dunpark awarded the declarator sought by the pursuers but he denied them their interdict. So long as the Eden remained in its central channel there was, he said, no threat to Council's interests of sufficient immediacy to warrant the issue of the interdict. Further, there was no prospect of enforcing it if it were breached because the Water Authority was beyond the jurisdiction and

<sup>1</sup> Below, p. 180.

<sup>2</sup> [1915] 2 K.B. 580.

<sup>3</sup> [1976] Q.B. 726.

<sup>4</sup> Cheshire and North, *Private International Law* (10th edn., 1979), pp. 639-40.

<sup>5</sup> *The Law of Civil Remedies in Scotland* (1974), p. 111.

<sup>6</sup> *Solway* case, pp. 268-9.



the District Council would, in any event, have to seek a remedy before the English courts.<sup>1</sup> In view of what has been described as an 'excess of judicial caution',<sup>2</sup> it is not clear that an English court would have been quite so ready to grant a declaration while the Eden channel ran south of the Altarstane. Equally, the Water Authority's preferred course of action of bringing criminal proceedings in England against Scottish fishermen for breaches of English fishing law was not available while the channel remained where it was. However, it is possible to see this matter in a different way, which not only would have resolved the problem of the hypothetical question but which would have avoided certain misconceptions which followed in the resolution of the principal issue. If the issue of the boundary had been put squarely before the court, as, it is submitted, it ought to have been, then the matter to be decided would not have been even arguably hypothetical: it would have been, what is the boundary between England and Scotland, *now*? As will be seen, a determination of that question will, to all practical intents, settle the question of where the boundary would be if, hypothetically, the channel were once again to move north.

Once Lord Dunpark had decided that he was competent to grant the declarator, it might have appeared that he needs must reach a decision on the borderline. However, he saw no such necessity:

... I am not called upon to lay down the boundary line between England and Scotland in the Solway Firth. I merely decide that [the boundaries of the Charter area] are not subject to variation by any alteration in the course of the River Eden.<sup>3</sup>

He was able to reach this conclusion because, and only because, of the curious way in which he framed the issue he had to decide. It was, he said,

Whether the area of the Solway Firth over which the defenders exercise jurisdiction can at any time include part of the lands granted by Royal Charter to the burghers of Annan ...<sup>4</sup>

This formulation had the effect of putting the burden of proof upon the Water Authority, the defenders in the action, which hardly seems appropriate, for Lord Dunpark dismissed its claim for a peripatetic, mid-channel boundary on the grounds that the Authority could show no evidence that such a boundary had ever been laid down by law or accepted in practice. Equally, however, no evidence was introduced on behalf of the District Council which compelled any other borderline, a deficiency which Lord Dunpark was able to ignore, for he concluded:

... the presumption is that the whole of the lands granted in 1538 by King James V of Scotland to the Burghers of Annan were then part of Scotland, and this conclusion is reinforced by the confirmation of King James I of Great Britain in 1612. It cannot be inferred that the King was making a grant of English territory

<sup>1</sup> Ibid., p. 269.

<sup>2</sup> De Smith, *Judicial Review of Administrative Action* (3rd edn., 1973), p. 449.

<sup>3</sup> *Solway* case, p. 269

<sup>4</sup> Ibid., p. 267.

to a Scottish burgh . . . Since the defenders do not maintain that the boundaries of the Burgh of Annan were thereafter restricted in any way, the lands described in these Charter areas are, in my opinion, Scottish territory at the present time and must remain so until the legislature decrees otherwise.<sup>1</sup>

It was, of course, the defender's contention precisely that the boundaries of the District Council had been restricted by the northward movement of the Eden. Lord Dunpark simply assumed the accuracy of the pursuer's case; at another point he called it 'irrefutable'. Legal disputes are not usually solved by the application of self-evident propositions. Even if there were authority in Scots law for the presumption that territory in Scotland cannot be lost other than by legislative enactment, it is wrong that this presumption should operate against a legal person in another jurisdiction, like the Water Authority in England. It is wrong because it is an attempt to solve what is essentially a dispute between two jurisdictional areas by reference to the law of only one of them, a prescription for continuing rather than resolving a controversy if the decision should be incompatible with a determination according to the law of the other. In this case, any grievance is likely to be exaggerated when the basis for the decision is a presumption, the legal authority for which was demonstrated neither by the pursuers nor by the court. The Water Authority's argument for a migrating, mid-channel boundary having been dismissed, Lord Dunpark's avoidance of the border question was possible only because the Annan Charter area happens to be defined with seaward limits. It leaves in doubt the status of the territory between the Charter area and any line south of it, such as the mid-channel of the Eden when it flows south of the Altarstane in which, as a matter of practice, the Annandale District Council does claim authority, as it leaves uncertainty also about the limits of other grants and leases on the Scottish side of the Solway, not having an outer limit defined. Although he purported not to be determining the boundary line, the only practical implication of Lord Dunpark's opinion that the line was always south of the Altarstane is that the boundary is the mid-line of the Solway measured from the high-water marks, for which no evidence had been offered. The Water Authority did not appeal against Lord Dunpark's judgment and later issued a notice to holders of haaf-net licences explaining the effect of the decision, part of which reads:

Although this decision would not be binding on an English Court, it would be binding on a Scottish Court. In any proceedings in Scotland therefore for fishing without a permit in the Charter Area, the possession of an N.W.W.A. licence would not be a defence.<sup>2</sup>

Even having been so critical of Lord Dunpark, it is impossible not to recognize his dilemma, for any alternative analysis shows the complexity of the problem with which the court was faced. The question is one which, by its very nature, could not be solved by the application of either

<sup>1</sup> *Solway* case, p. 269

<sup>2</sup> North West Water Authority notice, 'Solway Fishery Dispute', no date.

Scots law or English law alone.<sup>1</sup> Whilst it was a question which could have been settled by the law of Great Britain, viz. by legislation, it has not been. Although since the Acts of Union of 1707 England and Scotland have been part of the same State, neither the Treaty of Union nor any subsequent legislation of the Parliament of Great Britain has defined where lies the border between them. Even in the devolution legislation, no authoritative determination of the limits of Scotland was proposed.<sup>2</sup> It is clear that not only could Parliament legislate for this boundary but also that the boundary so provided need not correspond with that which would be required by international law. A State is not bound to adopt international boundaries for the divisions between its constituent areas.<sup>3</sup> Indeed, in municipal law, boundaries may be different for different administrative purposes, something which, while possible in international law, is most unusual for inter-State boundaries.<sup>4</sup> In England, at least, the Crown has a prerogative power to establish the bounds of the State<sup>5</sup> (and in view of the fact that the Territorial Waters Order-in-Council<sup>6</sup> makes provision for the sea limits off Scotland, it seems reasonable to assume that the same right is claimed with respect to Scotland) but this power also has not been used to proclaim a borderline in the Solway. There is not, nor could there be, a rule of common law (of England or Scotland) which determines national boundaries. Recourse to private law boundary rules by analogy runs the risk of producing different solutions according to English and Scots law, as it does, for instance, on the question of whether an exclusive right of

<sup>1</sup> When it was first proposed that by Treaty the English should have some rights to fish in Scottish waters off the Hebrides, provision was made for appeal to the Privy Council so that fishermen should not be aggrieved by decisions of the courts of the other nation on what was essentially an interpretation of an international agreement: Advocates Library Manuscript, 31. 2. 16.

<sup>2</sup> Scotland Act 1978 (repealed); see *Hansard*, H.L. Debs., vol. 393, col. 115, that devolved authority with respect to salmon fishing should follow the administrative limits at the Tweed (which would have given the Scottish Assembly some jurisdiction in England), but no consideration was given to the limits of authority in the Solway. The delimitation of the boundary between England and Scotland has been avoided also in the Cumbria Sea Fisheries District (Variation) Order, S.I. 1980, no. 806, s. 2 (1) of which reads in part: 'A sea fisheries district is hereby created, comprising so much of the sea within the national waters of the United Kingdom adjacent to England as is not included within the national waters of the United Kingdom adjacent to Scotland and so much of the sea within three nautical miles from the baselines from which the breadth of the territorial sea of the United Kingdom adjacent to England is measured as is not included within three nautical miles from the baselines from which the breadth of the territorial sea of the United Kingdom adjacent to Scotland is measured, with the adjoining coast . . .'. The boundary can be defined in this way because there are no Sea Fisheries Districts in Scotland; see Gibson, *Lloyd's Maritime and Commercial Law Quarterly*, 6 (1978), p. 340. It is not clear where the boundary is and it is unsatisfactory that potential criminal liability should be determined on the basis of such uncertain legislation.

<sup>3</sup> For example, the continental shelf boundary in the North Sea between England and Scotland is very different from the one which would result from applying the rules of international law: Continental Shelf (Jurisdiction) Order 1968, S.I. 1968, no. 892, s. 1; see Grant, *Devolution and Independence* (1975), ch. 6.

<sup>4</sup> But cf. Treaty between Austria and Italy regulating Fishing in the Adriatic 1869, *Consolidated Treaty Series*, vol. 140, p. 2; *Free Zones of Upper Savoy and Gex*, P.C.I.J., Series A, no. 24.

<sup>5</sup> *The Fagernes*, [1927] P. 311 (C.A.), 324, 330; *Post Office v. Estuary Radio Ltd.*, [1968] 2 Q.B. 740; Edeson, *Law Quarterly Review*, 89 (1975), p. 364.

<sup>6</sup> Territorial Waters Order-in-Council, 25 September 1964.



fishing follows the movement of the river to a wholly new course.<sup>1</sup> It may sometimes be appropriate to construe private boundaries having regard to public ones, for example, private land-holdings may be deemed to terminate at the boundaries of the territorial area of which they form a part,<sup>2</sup> and public boundaries within a State may be properly delimited by taking into account limits fixed by international law, especially where the municipal law utilizes the concepts of international law in defining internal boundaries.<sup>3</sup> The reason for this is, of course, that international law sets the limits to a State's jurisdiction and does not admit the validity of municipal claims beyond such limits.<sup>4</sup> On the other hand, in some cases, international law does take into account municipal law and administrative practices when fixing international boundaries. Such matters will always be relevant as evidence of possession, but in particular cases their impact may be more decisive. The doctrine of *uti possidetis* as applied between South American States<sup>5</sup> and the acceptance by the Organization of African Unity of the continuing validity of intra-colonial boundaries as the international boundaries between African States<sup>6</sup> are examples. However, where this happens, it involves the adoption of municipal boundaries after the creation of more than one State from a single law area, such as the Spanish Empire in Latin America or the British Empire in the Indian Sub-Continent.<sup>7</sup> They are not instances of the municipal law of the State determining the international boundary between that State and another.

In the absence of any municipal law solution, it is necessary to turn to the rules of public international law, which is the ordinary legal system for settling boundary questions between States.<sup>8</sup> In this way, conflicting claims based on national legal perceptions may be avoided. First, it has to be shown that international law is applicable to this dispute about what is, after all, now an internal boundary. This question has received a good deal of attention in federal States: does international law provide the rules to be applied in settling boundary disputes between member States of a federation? Although the contrary has sometimes been contended for, the better answer is that, as a general rule, it does not.<sup>9</sup> The reason for this is that international law purports to apply to relations between independent

<sup>1</sup> Cf. *Mayor and Corporation of Carlisle v. Graham*, (1869) L.R. 4 Exch. 361, and *Straiton v. Fullerton*, (1752) 29 Morrison 12, 797.

<sup>2</sup> *Arkansas v. Tennessee*, 246 U.S. 158 (1918).

<sup>3</sup> *The Fagernes*, [1927] P. 311 (C.A.). The Court took into account the international implications when they limited the effect of the decision in *R. v. Cunningham*, (1859) Bell's Cr. C. 72.

<sup>4</sup> *Anglo-Norwegian Fisheries case*, I.C.J. Reports, 1951, pp. 116, 132.

<sup>5</sup> *Guatemala-Honduras Boundary arbitration*, *Reports of International Arbitral Awards*, vol. 2, p. 1307.

<sup>6</sup> Organization of African Unity Resolution AHG/17(1); see McEwen, *International Boundaries in East Africa* (1971), pp. 21-7.

<sup>7</sup> See *Rann of Kutch arbitration*, 50 I.L.R. 2.

<sup>8</sup> Cukwurah, *The Settlement of Boundary Disputes in International Law* (1967).

<sup>9</sup> Cowles, *Recueil des cours*, 74 (1949-I), p. 659; Bernier, *International Legal Aspects of Federalism* (1973), pp. 239-49; see the argument for the defendants in *Rhode Island v. Massachusetts*, 12 Peters 657, 675.

States and not to disputes within a single State.<sup>1</sup> That is not to say that the courts of a federal State might not choose to apply the rules of international law when adjudicating in these cases. The absence of any alternative set of rules is a compelling reason why a federal court should adopt such a course<sup>2</sup> but it must be appreciated that it does so quite independently of the ordinary constitutional relationship between international law and municipal law. There is a category of cases involving intra-State boundaries when a federal court might properly apply international law directly. These are where the boundaries are fixed by international agreements, for example, by which a new and previously independent State is admitted to a federation.<sup>3</sup> Subject to any overriding rules of its domestic law, it is entirely appropriate that a federal court should interpret agreements of this kind according to the rules of international law subject to an important qualification: it should seek to apply international law in its condition at the time of the agreement; it should, in other words, have regard to the principle of the intertemporal law.<sup>4</sup>

There is no rule of United Kingdom law which allows a domestic court to have recourse to international law as if it applied to the boundary between England and Scotland. On the other hand, domestic courts have interpreted municipal law agreements in the light of international law as it prevailed at the time the agreements were made.<sup>5</sup> Furthermore, the England-Scotland boundary was an international boundary until 1707. If it has not been changed by municipal law since then, as it has not, then the international boundary as it existed in 1707 ought to be regarded as the present boundary. To state that proposition does not of itself resolve the question. Such opinions as existed at that time about water boundaries gave priority to agreements between the States. Only if there was no agreement was any general rule to be fallen back on. Grotius put the position this way:

In case of any doubt, the jurisdictions on each side reach the middle of the river that runs between them, yet it may be, and in some places actually has happened, that the river wholly belongs to one party; either because the other nation had not got possession of the other bank until later and when their neighbours were already in possession of the whole river, or else because matters were stipulated by some treaty.<sup>6</sup>

There was no treaty or any other specific arrangement between England and Scotland prior to 1707 which fixed the boundary. It must be

<sup>1</sup> Kunz, *American Journal of International Law*, 45 (1951), p. 329.

<sup>2</sup> *Rhode Island v. Massachusetts*, 12 Peters 657.

<sup>3</sup> e.g. *Louisiana v. Mississippi*, 201 U.S. 1 (1906).

<sup>4</sup> *Island of Palmas case*, *Reports of International Arbitral Awards*, vol. 2, p. 845; *Grisbadarna arbitration*, *ibid.*, vol. 11, p. 153; *Hague Court Reports*, p. 121; *Texas v. Louisiana*, 410 U.S. 702, 710; Blum, *Historic Titles in International Law* (1965), pp. 194-208.

<sup>5</sup> *Re Labrador Boundary*, (1927) 43 T.L.R. 259, 294.

<sup>6</sup> *De iure belli et pacis*, bk. 2, ch. 3, s. 18.

considered whether any borderline for the Solway had been fixed by practice before that date. Very early evidence is of limited value because of the changes of control of the frontier areas in the fourteenth and fifteenth centuries and because it is largely of a private law character. Thus, although one finds reference, for example, to a right of fishery granted in Scotland in the thirteenth century off Torduff Point, the southern boundary of which was later confirmed as 'the mid-stream line of the river which divides [Annandale] from Cumberland',<sup>1</sup> this is no evidence for the definition of the boundary at later dates. As the frontier area became more stable, border laws developed to regulate relations between England and Scotland, matters of fishing among them.<sup>2</sup> These laws were the result of agreements and practices of an international kind, but although fishing on the opposite shore by nationals of either State was forbidden by treaty in 1438,<sup>3</sup> there is no evidence that the border laws ever provided a boundary for fishing in the Solway. Scottish statutes had provided for special laws in the border rivers of the Solway and Tweed as early as 1429. By an Act of 1563, the Solway was uniquely exempted from a prohibition against fishing with fixed engines in the seas around Scotland but, again, there is no reference to any boundary. The agreement between England and Scotland of 1552 which settled the status of the 'Debateable Land' and fixed the land boundary as far as the mouth of the river Sark also does not extend to the adjacent waters of Solway.<sup>4</sup> A report prepared for Queen Elizabeth I in 1580 on the boundary in the frontier area concludes by describing it as

falling into the water of Sark, going down therewith into the river of Eden, which from thence forward is a notorious boundary till it fall into the sea.<sup>5</sup>

Unhappily, the Memorandum gives no indication of what the 'notorious' line was. The claim must be treated with some caution because none of the principal maps of the period nor even of a good deal later mark *any* boundary in the Solway, although most indicate some borderline on land.<sup>6</sup>

Where the border ran over land or down rivers, the need for definition

<sup>1</sup> Barrow, *The Kingdom of the Scots* (1973), p. 145; for an English example see *Verdict and Presentment of the Jury of Survey on the Attainder of Leonard Dacre, Esq.*, quoted in *Pleadings in Mayor and Corporation of Carlisle v. Graham*, pp. 125-9; Neilson, *Annals of the Solway until 1347 A.D.*, p. 43, suggests that the mid-channel of the Esk had been the border as early as the thirteenth century.

<sup>2</sup> Rae, *The Administration of the Scottish Frontier, 1513-1603* (1966); Nicholson, *Leges Marchiarum* (1725).

<sup>3</sup> Neilson (ed. Rae), 'The March Laws', *Miscellany I* (Stair Society Publications 26), p. 63.

<sup>4</sup> See Mack, *The Border-Line* (1928), pp. 88-90.

<sup>5</sup> *Ibid.*, pp. 40-1. The same limitation affects Johnson and Goodwin's Survey, 1604, *ibid.*, pp. 42-3.

<sup>6</sup> John Speed's *Atlas* (1610); Blaeu's *Great Atlas*, vol. VI, 'Ireland and Scotland, Annandiae Praefectura' (1656); Coronelli, *Atlante Veneto* (1690); Saxton and Lea, *Anglia: Kingdome of England and Principality of Wales exactly described* (1693); De Witt's *Atlas* (1696-7); Roy, *Map of Scotland 1747-55*, Sheet 6, shows the land boundary to the Sark mouth but no boundary in the Solway. The Eden channel is shown running very close to the Scottish coast.



and demarcation of the boundary was compelled by the need to resolve what were essentially private disputes about land-holdings and fishing rights. After James had become King of England as well as Scotland following the Union of Crowns in 1603, disturbances on and across the border gradually disappeared.<sup>1</sup> The borderline became widely accepted and private disputes were settled according to the appropriate national law. In the Solway, salmon fishing on a commercial scale had been long established on the Scottish side. In England, although there was some netting, fishing seems to have been largely confined to a somewhat primitive sporting exercise of spearing fish from horseback. This discrepancy of intensity of interest in the fishing might explain the extensive Scottish claims to the Solway at this time. It has to be remembered that Scotland was engaged in a serious dispute with Holland about the right to fish in the seas around Scotland, mainly for herring.<sup>2</sup> The Scottish claim, which had at one time been for an exclusive right in its adjacent waters to the mid-point with the land opposite, was for this right within a 'kenning' or fourteen miles from its coasts, with very extensive straight baselines drawn across various bays.<sup>3</sup> The Solway was listed simply as one of the firths over which this jurisdiction was claimed, with no special consideration given to any English interest there.<sup>4</sup> Fulton has a map showing the extent of the Scottish claim.<sup>5</sup> In the Solway, the closing line is drawn from the Mull of Galloway to somewhere near Silloth on the Cumberland coast. At this time, the Scottish claim would have been made against England as well as Holland.<sup>6</sup> The Draft Treaty of Union of 1604 (which was not acceptable to the English Parliament for reasons unconnected with the fishing clauses) reserved fishing in lochs and bays and to a distance of fourteen miles from the coast to the local nationals. Provision was made for the delimitation of these areas but, because the Treaty failed, the demarcation was never carried out.<sup>7</sup> Negotiations resumed in the 1630s, when the Scottish Commissioners were instructed to take care that a clause be inserted in the treaty that the waters off the Scottish coast to the middle of the land opposite belonged to the Crown of Scotland and the English had no rights there.<sup>8</sup> The clause was intended principally to assert Scottish rights in the North Sea and off the Hebrides. It may have had no application to the Solway but, even if it did, the phrase 'to the middle of the land opposite' is not sufficiently precise to apply to the conditions there. When negotiations were successfully concluded in 1632, the agreement made no special provision for the Solway. Whatever the

<sup>1</sup> Neilson (ed. Rae), loc. cit. above (p. 176 n. 3), p. 77.

<sup>2</sup> Fulton, *The Sovereignty of the Sea* (1911), chs. IV and V.

<sup>3</sup> Ibid., p. 223. Elder, *The Royal Fishery Companies of the 17th Century* (1912), p. 9.

<sup>4</sup> *Memorandum concerning the fishing amongst the coast of England, Cornwall etc.*, pp. 21, 35, Advocate's Library Manuscript 31. 2. 16.

<sup>5</sup> *The Sovereignty of the Sea*, p. 231.

<sup>6</sup> Elder, op. cit. above (n. 3), p. 10.

<sup>7</sup> Fulton, op. cit. above (n. 2), p. 232.

<sup>8</sup> Ibid., p. 226.

importance of fishing in the early part of the seventeenth century, when the Union of Kingdoms was accomplished in 1707, its significance had apparently diminished because the Acts of Union contain no fishery clause. Rights of the English to fish off Scotland had, in any event, been granted in connection with the establishment of Royal Fishery Companies to exploit the herring off the north-west coast of Scotland.<sup>1</sup> The English equivalent to the wide Scottish fishery claims was the King's Chambers for the protection of neutral rights. However, in the Irish Sea these extended only so far as the Isle of Man and there was no conflict with any Scottish rights in the Solway.<sup>2</sup>

Apart from the Memorandum of 1580 claiming that the Solway boundary was 'notorious', it seems fair to conclude that the evidence supports no settled boundary on the basis of practice before 1707. This leads to a need to consider the position under general customary international law. In the *Solway* case the North West Water Authority argued its case for the *medium filum aquae* on the basis that the Solway was a river and that the international law of river boundaries was the appropriate law. Whilst these rules have developed considerably since the beginning of the eighteenth century, it is not clear, even in the present state of the law, that general customary law provides conclusive guidance on the matter of boundaries in international rivers. Professor Bouchez concludes his study of river boundaries thus:

Although there is no predominating principle . . . it is clear from the practice of states that the thalweg boundary is a generally applied principle for rivers in which navigation is an important factor, while the median line has frequently been applied to all other rivers.<sup>3</sup>

This is hardly the language of obligation. The principle of the thalweg to which Professor Bouchez refers is that the boundary should follow the middle line of the deepest channel so that the right of navigation does not fall under the exclusive jurisdiction of either of the riparian States, as it may do if the median line, i.e. the line of equidistance from the opposite banks measured over the surface of the water, is adopted as the boundary. Even as they have been defined, neither thalweg nor median line is free from ambiguity.<sup>4</sup> Furthermore, such certainty as there is in the present law is a relatively modern phenomenon. Professor Verzijl's historical survey concludes that the 'competition' between the median line and the thalweg came to a head only at the beginning of the nineteenth century.<sup>5</sup>

<sup>1</sup> Elder, *op. cit.* above (p. 177 n. 3), ch. VII.

<sup>2</sup> Colombos, *The International Law of the Sea* (6th edn., 1967), pp. 182-3.

<sup>3</sup> *International and Comparative Law Quarterly*, 12 (1963), pp. 789, 798-9; to the same effect, De Lapradelle, *La Frontière* (1928), p. 206; for a rather firmer conclusion in favour of the thalweg, Bowett, *The Legal Regime of Islands in International Law* (1979), p. 62.

<sup>4</sup> Adami, *National Frontiers in Relation to International Law* (1927, translated by Behrens), pp. 17-18; Boggs, *International Boundaries: a Study in Boundary Functions and Problems* (1940), pp. 176-92; E. Lauterpacht, *International and Comparative Law Quarterly*, 9 (1960), pp. 208, 216-20.

<sup>5</sup> *International Law in Historical Perspective*, vol. 3 (1970), p. 553.

Indeed, far from the thalweg being the customary law before then, Professor Verzijl found that even a division of a river by a median line was rare. He ends his survey of the earlier practice by saying that the evidence 'does not testify to the adoption of any fixed, general customary law'.<sup>1</sup>

Recourse even to these uncertain principles depends upon the characterization of the Solway as a river. Lord Dunpark cast some doubt on the relevance of the authorities called in aid by the defenders, especially those which dealt with the movement of a river boundary. They hardly seemed appropriate to the conditions in the Solway as an estuarial bay.<sup>2</sup> Various closing lines have been applied to the Solway and all of them fall to the seaward side of the part of the Firth with which we are concerned.<sup>3</sup> Equally, even if it be not a historic bay, the Solway in its narrow part at least appears to satisfy the definition of a bay provided by the Geneva Convention on the Territorial Sea.<sup>4</sup> The question is not so much whether this part of the Firth falls within a bay as whether it falls beyond the rivers which flow into it. In English law the line between river and tidal waters is the point to which the tide ebbs and flows,<sup>5</sup> a point some way up both the Eden and the Esk from the Solway and, of course, the fishing in the disputed area is a public fishery, one in the sea rather than in a river. Scots law seems less certain about the dividing line but the case of *Oswald v. McWhirter*<sup>6</sup> makes it clear that the central part of the Solway is to be distinguished from the rivers that flow into it. The Act of 1563 which exempted the 'waters of Solway' from the restriction against fixed engines was held not to grant exemptions in the rivers which flowed into the Solway.

However, the consequence of regarding the Solway as a bay rather than a river is that the rules about boundaries in international bays are, if anything, even less well established than they are for rivers. The International Law Commission was not able to lay down any rules for them in its Draft Articles for the 1958 Geneva Conference on the Law of the Sea.<sup>7</sup> The Convention on the Territorial Sea which resulted from that Conference applies only to bays surrounded by the territory of a single State.<sup>8</sup> Each of the leading monographs in English on bays concludes that there are no general rules for establishing boundaries in international bays.<sup>9</sup> Professor Verzijl thinks that there is a presumption that, in the case

<sup>1</sup> Ibid., p. 542.

<sup>2</sup> Cf. Pritchard, 'What is an estuary: physical viewpoint' in Lauff (ed.), *Estuaries* (1967), pp. 3-5.

<sup>3</sup> e.g. Salmon Fisheries (Scotland) Act 1868, Sch. B, from the Mull of Galloway to Hodbarrow Point, Cumberland.

<sup>4</sup> Art. 7.

<sup>5</sup> *Malcolmson v. O'Dea*, (1862) 10 H.L.C. 593; Coulson and Forbes, *On Waters* (6th edn., 1952), pp. 413-16.

<sup>6</sup> 1 Sh. and M'L. 393 (1835) (H.L.).

<sup>7</sup> *General Assembly Official Records*, 11th session, Supp. no. 9 (A/3159), p. 16.

<sup>8</sup> Art. 7; the same rule is included in the Revised Informal Composite Negotiating Text, Art. 10.

<sup>9</sup> Bouchez, *The Regime of Bays in International Law* (1964), p. 196; Strohl, *International Law of Bays* (1963), p. 374.



of river estuaries, the boundary follows the boundary in the river (which he assumes would be the thalweg).<sup>1</sup> There is some evidence that a median line may be a more usual dividing line in bays than in rivers but such examples can be explained by the terms of specific agreements regulating the boundary in the bay rather than as a reflection of any general rule.<sup>2</sup> The significance of any distinction between bay and river is diminished for tidal estuaries like the Solway. In the absence of agreement, the effective choice of boundary lines is limited to the median line and the thalweg (though there may not be an obligation to adopt either). In customary international law the median line is the line between opposite banks at *low water*,<sup>3</sup> which in the Solway (so far down as the channel of the Eden is identifiable) is almost the same line as the middle of the deepest channel because the tide recedes as far as the banks of that channel.<sup>4</sup> However, in another respect, there is an important difference between the two lines. One feature of the thalweg doctrine is that the boundary line moves as the channel moves, the whole purpose of the principle being to ensure that the navigation track does not fall under the jurisdiction of a single riparian. The median line appears as a more settled boundary because the points from which it is measured are usually relatively stable, since the rule is applied either to non-tidal bays<sup>5</sup> in which change may be imperceptible or to tidal bays where any alterations of the configuration of the low-water marks is not necessarily very substantial. Further, a median line, once fixed, may remain the boundary quite independently of any change in the outlines of the bay.<sup>6</sup> In bays like the Solway, the changes in the low-water limits can be quite as dramatic as changes in a thalweg. These changes can seldom be precisely explained, so that any attempted application of the rules about alluvial or avulsive change (which Lord Dunpark thought not to apply to the Solway anyway)<sup>7</sup> presents almost insurmountable practical difficulties of proof.

Taken together, these considerations suggest that of the possible rules of general customary international law which might provide a boundary line, conditions in the Solway favour the application of the thalweg principle, or some variant of it, rather than a median line. In particular, a migrating boundary rather than a fixed one would seem best to meet the practical circumstances there. Any other boundary, for instance a median line based on the high-water mark, could only apply if it could be shown, which it cannot, that practice or agreement had established a special line for the Solway.

<sup>1</sup> *International Law in Historical Perspective*, vol. 3 (1970), pp. 593-4; also *New Jersey v. Delaware*, 291 U.S. 361, 383-4 (1934).

<sup>2</sup> e.g. Passamaquoddy Bay, Washington Convention 1908, Art. 1: *Treaties and International Agreements of the United States*, vol. 12, p. 297.

<sup>3</sup> Geneva Convention on the Territorial Sea, Art. 3; *Chamizal* arbitration, *American Journal of International Law*, 5 (1911), p. 785.

<sup>4</sup> For a thorough consideration of the problem of boundaries in tidal areas, see Shalowitz, *Shore and Sea Boundaries*, vol. 1 (1962), ch. 6.

<sup>5</sup> e.g. *Wisconsin v. Michigan*, 295 U.S. 455 (1935).

<sup>6</sup> e.g. Passamaquoddy, above, n. 2.

<sup>7</sup> *Solway* case, p. 270.

On the other hand, it may quite properly be argued that there is no obligation in international law to apply the thalweg or the median line, and certainly there was no obligation on States to do so in 1707. It begins to appear that Professor Verzijl's hint may be correct and that the proper finding for a tribunal faced with a boundary question in a river or bay is one of *non liquet*.<sup>1</sup> In fact, however, the Permanent Court of Arbitration has been confronted with a boundary problem which shares many similarities with the Solway boundary. That case was the *Grisbadarna* arbitration,<sup>2</sup> in which the tribunal was asked to lay down the maritime boundary between Norway and Sweden in the Idelfjord. This involved the interpretation of the Treaty of Roskilde of 1658 and a subsequent boundary agreement of 1661. Applying the principle of the intertemporal law,<sup>3</sup> the Tribunal rejected a boundary line based either on the thalweg or on the median line because neither rule was established in the customary law by the seventeenth century. Instead, it decided that

We shall be acting much more in accord with the ideas of the seventeenth century and with the notions of law prevailing at that time if we admit that the automatic division of the territory in question must have taken place according to the general direction of the land territory of which the maritime territory constituted an appurtenance, and if we consequently apply this same rule at the present time in order to arrive at a just and lawful determination of the boundary.<sup>4</sup>

Applying this rule to Idelfjord resulted in delimitation according to a straight line almost perpendicular to the coast at the point where the land boundary met the sea, subject to a minor modification of 1° N. to avoid cutting across the Grisbadarna Banks. The Arbitral Agreement directed the Tribunal to indicate a line which did not divide islands or shoals in the boundary area. The Tribunal produced a line north of the Grisbadarna Banks because Sweden had been able to demonstrate a long and predominant interest in respect of the fishing on the Banks. As the Tribunal said,

international law requires that a state of things which actually exists and has existed for a long time should be changed as little as possible.<sup>5</sup>

How would the rule on which this decision is based be applied to the Solway? It is to be noted that the Permanent Court of Arbitration was purporting to apply international law more or less contemporaneous with the Acts of Union. Of course, for the Solway Firth, there is no boundary

<sup>1</sup> *International Law in Historical Perspective*, vol. 3 (1970), pp. 563, 591.

<sup>2</sup> *Hague Court Reports*, p. 121.

<sup>3</sup> The Permanent Court of Arbitration said: 'in order to ascertain which may have been the automatic dividing line of 1658, we must have recourse to the principles of law in force at that time': *ibid.*, pp. 121, 127.

<sup>4</sup> *Ibid.*, pp. 121, 129. Also Adami, *National Frontiers in Relation to International Law* (1927, trans. Behrens), p. 50; Blum, *Historic Titles in International Law* (1965), pp. 198-9.

<sup>5</sup> Also Mr. Justice Marshall in *Handly's Lessee v. Anthony*, 18 U.S. 374 (1820): 'It is a fact of no inconsiderable importance that the inhabitants of this land have uniformly considered themselves and have been uniformly considered, both by Kentucky and Indiana, as belonging to the last mentioned state.'

agreement to be interpreted: it is simply a matter of applying customary international law. The decision in the *Grisbadarna* arbitration provides a fixed boundary line. However, the principle of following the land boundary into the sea cannot be applied directly to the Solway. The land boundary between England and Scotland is the *medium filum* of the river Sark. The Sark does not enter the Solway at its eastern limit but a mile or so from there along the northern shore. It enters the sea in an approximately north-south direction. If this line be continued, it meets almost immediately Rockcliffe Marsh on the English side. A straight line boundary was once contended for by the Burgh of Annan, though as a limit to its criminal jurisdiction rather than as the national boundary.<sup>1</sup> The line, based on the limits set down in the Annan Act 1841, was from the low-water mouth of the Lochar to the low-water mouth of the Sark. This line was not accepted by the Scottish courts, even as a limit to the Burgh's criminal jurisdiction, as a matter of statutory interpretation.<sup>2</sup> However, it indicates the practical possibility of a straight line boundary, although at least one turning-point would be necessary, somewhere off Torduff Point. This boundary line would give priority to the fixedness of the boundary over any other consideration. The Lochar mouth would not necessarily be the western extremity of the line nor even a turning-point on it. The line should follow the general direction of the coasts, which does not imply equidistance, particularly equidistance along its whole length. It would run from the centre point of the closing line of the Solway Firth in a straight line to a point near the Lochar mouth, then in another straight line to a point off Torduff Point and finally from there to the *medium filum* of the Sark where it enters the Firth. Whatever turning-points are decided upon, it seems that the line would inevitably pass south of the Altarstane. Thus it would seem to satisfy, in one particular, the second part of the *Grisbadarna* award, the principle that the existing state of things should be disturbed as little as possible. Undoubtedly, it would be argued by the Scottish proprietors that not merely one particular interest was properly accommodated by this boundary line, but that the most important and the longest-standing interest had been appropriately protected. About the economic priority of the fixed engines there is no argument. Equally, until July 1976, there seems never to have been an attempt to regulate fishing north of the Altarstane by an English authority, no matter how far north the Eden channel has run. A Scottish claim to the maintenance of the fishing rights is directly comparable to the rights of Sweden over the Banks recognized in the *Grisbadarna* award. The vested rights of the proprietors on the Scottish shore have always been acknowledged by those bodies investigating Solway fisheries. Proposals for a uniform fisheries regime on both sides of the border have usually suggested that the rights to use fixed

<sup>1</sup> For the details, see *Royal Commission on the Fisheries of the Solway Firth* (1896), C. 8182, pp. 6-8.

<sup>2</sup> The Annan Burgh Council claim was rejected in a case called *Irving* (1880) (unreported).



engines of the Scottish proprietors should be bought out and not merely terminated.<sup>1</sup>

On the other hand, almost all the evidence of the practice in the Solway suggests that fishermen and enforcement officers in both England and Scotland have regarded the mid channel of the Eden, certainly when it is running south of the Altarstane, as the boundary between England and Scotland. A mass of evidence was presented to the various commissions at the end of the nineteenth century to support this,<sup>2</sup> of which a telling example is the statement put in on behalf of the Burgh of Annan to the Royal Commission of 1896:

The Town Council maintains that the Burgh possesses an indisputable title to their salmon fishings from the shore to mid-channel.<sup>3</sup>

Before the establishment of that Royal Commission, the Secretary of State for Scotland had recommended the setting up of a Commission of Inquiry into the friction in the border area, arising because, amongst other reasons, the boundary between the Scotch and English sides is a constantly shifting one, owing to constant changes occurring from the operations of the tides.<sup>4</sup>

Although it was not specific as to the exact boundary line, in *Murray v. Earl of Selkirk*,<sup>5</sup> the Court of Session itself regarded the boundary as being in some way dependent on the direction of the river. In *Gammell v. Commissioner of Woods and Forests*,<sup>6</sup> the House of Lords' judgment about the nature of the right to salmon fishings in the sea around Scotland clearly assumes that the seaward limit of that right is fixed by international law.<sup>7</sup> The Courts were not concerned with fishing in closed waters like the Solway Firth but in a long memorandum of evidence to the Royal Commission on Solway Fisheries, the legal representative of the Scottish proprietors other than the Burgh of Annan interpreted the *Gammell* decision as fixing the outer limit of their holdings in the Solway as the *medium filum aquae*.<sup>8</sup>

None of the inquiries into the Solway fisheries recommended any particular borderline. They have usually proposed a uniform fisheries regime for the narrow part of the Firth, which would eliminate the significance of the boundary.<sup>9</sup> As an exception, the Commission of

<sup>1</sup> *Royal Commission on the Fisheries of the Solway Firth* (1896), C. 8182, p. 10.

<sup>2</sup> *Committee on White Fishing in the Solway* (1892), C. 6798, p. 1; *Royal Commission on the Fisheries of the Solway Firth* (1896), C. 8182, p. 8; id., *Notes of Evidence*, C. 8183, pp. 6-7 (Holmes), 11 (Stafford), 33, 41 (Macdonald), 49 (Bryson), 51 (Davidson), 53 (Richardson), 92 (Phyn), 117-18 (Pool).

<sup>3</sup> *Notes of Evidence*, C. 8183, p. 68.

<sup>4</sup> *Hansard*, 3rd ser., H.L. Debs., vol. 354, col. 729.

<sup>5</sup> 2 Shaw's App. 299, 306. See also Tait, op. cit. above (p. 165 n. 6), p. 223, reviewing the legislation of the nineteenth century, to the effect that after 1861 the Solway Act 1804 applied to '... the river Esk north of its *medium filum* so far as it is the boundary between England and Scotland'.

<sup>6</sup> 3 McQ. 419 (1859).

<sup>7</sup> Ibid., especially per Lord Wensleydale at pp. 465-6.

<sup>8</sup> *Notes of Evidence*, C. 8183, p. 32 (Macdonald).

<sup>9</sup> *Royal Commission on the Fisheries of the Solway Firth* (1896), C. 8182, p. 10.

Inquiry of 1881 did suggest that conflicts in the Solway could be reduced, 'if the exact limits of England and Scotland could be decided by some competent authority and buoys placed at reasonable distances to mark the boundaries',<sup>1</sup> a suggestion which Lord Dunpark in the *Solway* case took to indicate that it was the boundary line itself, rather than merely its demarcation, which had not been established by 1880.<sup>2</sup> The Commissioners' proposal that the boundary be buoyed is hardly consistent with a moving boundary and their final recommendation implied some line other than mid channel:

The Lords of the Admiralty should be asked to buoy the boundary between Scotland and England from Sark Foot *to the centre* of the line drawn from Carsethorn to Skinburness.<sup>3</sup>

This suggests a median-line boundary. Such a recommendation goes against all the evidence the Commissioners received about the boundary, to the effect that it was the *medium filum* of the low-water channel and that it shifted as the channel shifted.<sup>4</sup>

Apart from the exceptional circumstances when the Eden channel moves into areas where the fixed engines operate, the boundary is of practical importance only to haaf-net fishermen who, starting from the high-water mark at the flood tide on English and Scottish shores, follow the tide out to the middle of the river channel at the ebb. Their practice is to regard the deepest point of the main channel as the boundary. This, it should be noticed, is not the *medium filum aquae* but the same as a thalweg, and it is used by the haaf-netmen because of its practical utility to their unique method of fishing. It is this method of fishing, as well, that makes a fixed median-line boundary, normally the preferred line of division of waters of which the principal use is fishing, inapposite to the Solway.<sup>5</sup>

<sup>1</sup> *Report on the Laws affecting Salmon Fisheries in the Solway Firth* (1881), C. 2769, p. xii.

<sup>2</sup> *Solway* case, p. 268.

<sup>3</sup> *Report on the Laws affecting Salmon Fisheries in the Solway Firth* (1881), C. 2769, p. xv (emphasis added).

<sup>4</sup> *Ibid.*, *Notes of Evidence*, e.g. pp. 1 (Robinson), 9 (Thoburn), 16 (Ward).

<sup>5</sup> e.g. Passamaquoddy Bay, p. 180 n. 2 above. For a domestic case involving division of an estuarial fishery by a migrating boundary, the *medium filum*, see *Miller v. Little*, (1878) 4 L.R.Ir. 302. It should be noted that the method of fishing which was at the centre of the various controversies about fishing in the Solway at the end of the nineteenth century was 'whammel-netting'. This technique involved a single boat floating a very long net across the river channel at the flood tide and drifting down the channel as the tide ebbed. When the tide turned, the process was reversed and boat and net were carried back up the river channel by the tide. Whammel-netting was most effective when the net had been shot across the whole channel. The technique was not permitted in Scotland but it was in England. The complaint of the Scots' proprietors was that whammel fishermen holding English licences were fishing in the whole channel, i.e. partly in Scotland if the boundary lay somewhere in the river channel, as the proprietors invariably claimed that it did. Although whammel-netting is still licensed by the North West Water Authority only a few licences are now issued (four in 1979) and its impact on the border has been virtually eliminated because the licensed area does not commence until south of the line near the northern shore of the River Wampool. See North West Water Authority Fishery Bye-Laws, 7(f). I am grateful to Mr. P. Woods of the Water Authority for this and other information.

Early Ordnance Survey maps<sup>1</sup> followed the example of private map makers<sup>2</sup> and marked no national boundary in the Solway. Under the Act of 1841, the Ordnance Survey is under no obligation to indicate the national boundaries on its maps. The present series of 1:50,000 maps does indicate a national boundary line.<sup>3</sup> The position of the Ordnance Survey is that

The boundary between England and Scotland stems from the Act of Union 1706(S), 1707(E) and is considered to be the centre of the main channel of the river at low water.<sup>4</sup>

There is an added complication to demarcating this boundary. The low-water mark baseline is different in Scotland, where it is the mean low-water mark, springs, from that in England, where it is the mean low-water mark.<sup>5</sup> The juridical weight to be attached to maps is not free from controversy in either international law<sup>6</sup> or domestic law.<sup>7</sup> The significance of the Ordnance Survey maps in this case is not that they define a boundary conclusively as a matter of law, even though they are official maps, but that they are evidence of how the boundary has been regarded in practice in recent years.

The question is whether this practice is of any weight in determining the boundary line. In the absence of considerations of prescription, which do not seem to apply here, practice contrary to an established boundary line simply amounts to a continuing trespass or breach of the boundary. If the boundary line were fixed in 1707, practice since then could not change it. However, in the *Grisbadarna* arbitration, when it relied on its second principle, that of interfering as little as possible with the long-established condition of things, the Tribunal used the practice of the Swedish authorities and fishermen to say what the boundary *was*, and was apparently in 1661. The conclusion about the Solway boundary tentatively reached above must now be reiterated. It was that the application of

<sup>1</sup> The original 6" survey shows parish and county boundaries as the mid-channel of the rivers in the Solway but indicates no national boundary: Cumberland, Sheet IXA, Annan, Sheet LXIII (1857-1867).

<sup>2</sup> e.g. C. & I. Greenwood, *Map of the County of Cumberland from an actual survey made in years 1821 and 1822* (1823).

<sup>3</sup> Ordnance Survey, 1:50,000, 2nd Series, Sheet 85, Carlisle and Solway Firth (1976). The North West Water Authority put in evidence 1" Ordnance Survey maps showing a national boundary, starting in 1962: *Solway* case, p. 269.

<sup>4</sup> Letter from Ordnance Survey, 2 October 1979; see also Hartley, *Ordnance Survey Maps: a Descriptive Manual* (1975), pp. 81, 96, 112, 126. The Crown Estate Commissioners use the boundary as shown by the Ordnance Survey for the division of their responsibilities for salmon fishing in the Solway between their London and Edinburgh offices and they accept that the boundary is a moving one. I am grateful for this information to Lord Thomson of Monifieth, First Commissioner of Crown Estates.

<sup>5</sup> In England, the low-water mark is the average of the medium tides during the year: *Attorney-General v. Chambers*, (1854) 23 L.T.O.S. 238. In Scotland, the low-water mark is that of the ordinary spring tides, no account being taken of neap tides: *Agnew v. Lord Advocate*, (1873) 11 M. 309.

<sup>6</sup> Weissberg, *American Journal of International Law*, 57 (1963), p. 78; Sandifer, *Evidence before International Tribunals* (rev. ed. 1975), pp. 229-40.

<sup>7</sup> Ordnance Survey Act 1841, s. 12; *Great Torrington Commons Conservators v. Moore Stevens*, [1904] 1 Ch. 347; cf. *Re Labrador Boundary*, (1927) 43 T.L.R. 289, 298, where maps were admitted as evidence of *what* the boundary was.



the *Grisbadarna* principle resulted in a fixed boundary, which was a straight line following the general direction of the coasts from Sark mouth to the sea, and that since a single line *tout court* was not possible, such a line must be drawn with one or more turning-points. A boundary line drawn in this way would fall south of the Altarstane and thus preserve as Scottish for ever the rights of the Annandale District Council and the other Scottish proprietors.<sup>1</sup> In the *Grisbadarna* case, the Tribunal was able to preserve the long-established Swedish interests by a minor deviation of the boundary line and, what is more, without doing any great violence to the basic premiss on which it was drawn.<sup>2</sup> Such a simple accommodation of the practice in the Solway is not possible. Any line which takes the practice into account would be at variance with the primary line, not merely a variation of it. Practice from the nineteenth century to the present time supports a moving boundary based on the *medium flum aquae*, for which the *Grisbadarna* case says there was no international legal authority by the middle of the seventeenth century.<sup>3</sup>

It is not suggested that the boundary line which results from the application of the *Grisbadarna* principles is satisfactory: manifestly it is not. It is, however, the boundary. One can contrast the attitude of the Privy Council in *Re Labrador Boundary*,

the duty of the Board is not to consider where the boundary in question might wisely and conveniently be drawn but only to determine where, under the documents of title that might be drawn to their notice, that boundary is actually to be found,<sup>4</sup>

with that of Mr. Justice Cardozo in *New Jersey v. Delaware*, when he said:

In 1783, when the revolutionary war was over, Delaware and New Jersey began with a clean slate. There was no treaty or convention fixing the boundary between them. There was no possessory act nor other act of dominion to give the boundary in the bay or the river . . . a practical location. In these circumstances, the capacity of the law to develop and apply a formula consonant with justice and the political and social needs of the international legal system is not lessened by the fact that at the creation of the boundary, the formula of the Thalweg had only a germinal existence. *The gap is not so great that adjudication cannot fill it.*<sup>5</sup>

In the case of the Solway boundary, the difference between the boundary and the actual practice is so great that, even if a court could be persuaded

<sup>1</sup> In this way, any arguments of the proprietors based on the Act of Union would be avoided, not that any claim by them that this is a justiciable matter of 'private right' is likely to consist with the opinion of Lord Keith in *Gibson v. Lord Advocate*, 1975 S.L.T. 134. Any claim by the District Council based on the entrenched privileges of the Royal Burghs in the Act of Union would have to surmount the obstacle that the Burghs have been abolished by the Local Government (Scotland) Act 1973; see Dickinson, *New Law Journal*, 126 (1976), p. 899. For an altogether more vigorous assertion of the continuing constitutional impact of the Act of Union, see MacCormick, 29 *Northern Ireland Law Quarterly*, 29 (1978), p. 1.

<sup>2</sup> Scott, *Hague Court Reports* (1916), p. 121, 129.

<sup>3</sup> *Ibid.*

<sup>4</sup> (1927) 43 T.L.R. 289, 291.

<sup>5</sup> 291 U.S. 361, 383-4 (emphasis added). In the same vein, also about river boundaries, Judge Lachs in *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, pp. 1, 222.

to abandon the rigid approach of the Judicial Committee in *Re Labrador Boundary*, nothing recognizable as judicial activity, even by such as Mr. Justice Cardozo, can make the accommodation: the gap is too wide. It is too wide even though the rules applicable to boundary disputes are infused with 'principles of equity'<sup>1</sup> and admit an unusual degree of flexibility in their judicial application. Whatever the similarities between judicial and political techniques for resolving boundary questions in international relations, there remain limits to the judicial process which do not attend political settlement. In the Solway, there is scope for the exercise of judicial discretion in the delimitation of the boundary line but the applicable law insists on a fixed line and does not allow a migrating one. There is nothing inherently non-justiciable about boundary disputes and the very flexibility of the rules makes judicial settlement a suitable process to use.<sup>2</sup> The fact that decisions on municipal boundaries are often not left to judicial determination reflects a policy choice to retain control in the hands of political bodies of matters which may very well lie at the root of political power<sup>3</sup> and a corresponding reluctance of courts to involve themselves in questions of acute political controversy.<sup>4</sup> International judicial tribunals are to some extent insulated from this pressure and are seldom entrusted with issues of general principle of boundary law; more often, they are charged with resolving matters of detail, and the politically charged decisions are left to direct settlement by treaty.<sup>5</sup> Even here, though, just as with municipal courts, both the assessment of the evidence and the detailed delimitation of the boundary poses special problems for the actual application of the rules of law determined by the international tribunal.<sup>6</sup> These difficulties may be mitigated where the Court is confronted with an agreement between the parties, whether it is a boundary treaty *per se* or the *compromis* which settles the precise question for the tribunal to determine.

For the Solway boundary, there are no parties to reach an agreement. The Water Authority and the District Council did try to negotiate a solution when the Eden channel moved into the Charter area. The negotiations failed, but even if they had succeeded, they would have produced no more than a *modus vivendi* and any other person aggrieved by the settlement would have had the possibility of reopening the matter in the courts. The *Solway* case itself is unsatisfactory partly because

<sup>1</sup> Brownlie, *Principles of Public International Law* (3rd edn., 1979), p. 127.

<sup>2</sup> Munkman, this *Year Book*, 46 (1972-3), p. 1.

<sup>3</sup> For the fixing of electoral boundaries in the United Kingdom, see Hartley and Griffith, *Government and Law* (1975), pp. 34-8.

<sup>4</sup> *Colegrove v. Green*, 328 U.S. 549; *Baker v. Carr*, 369 U.S. 186.

<sup>5</sup> The great territorial adjustments made by arrangements such as the Treaty of Versailles are the most important examples.

<sup>6</sup> The United States Supreme Court has on many occasions used hearings before a Special Master in inter-State boundary cases, e.g. *Wisconsin v. Michigan*, 295 U.S. 455; *U.S. v. California*, 344 U.S. 872. In the *Argentine-Chile Frontier* case, 38 I.L.R. 10, the Tribunal consisted of a lawyer, a geographer and an engineer.

Lord Dunpark, despite his protestations to the contrary, was confronted with a boundary question, the determination of which might have been better left to a legislative or administrative agency. Not only that, but arguably the wrong court was charged with the boundary question. The fundamental objection to the Court of Session's considering it is not that the Court did not answer the question properly, but that it could not answer it properly because the answer required the resolution of a dispute *between* England and Scotland, not one in Scotland alone. Lord Dunpark did not take into account, perhaps could not have taken into account, this observation from a leading Scots law textbook:

The Tweed and the Solway, being waters common to the Scots and to their 'auld enemies' have had a history different from that of other rivers and estuaries in Scotland.<sup>1</sup>

But what court could have taken account of this? In *MacCormick v. Lord Advocate*,<sup>2</sup> Lord President Cooper made the well-known suggestion that matters arising out of the Acts of Union between Scotland and the United Kingdom might be heard by the International Court of Justice.<sup>3</sup> At one stage in this dispute, the parties evidently considered taking their case to the Court of Justice of the European Communities. The best answer, if the question really must be put to a court, is that the boundary question should go to the Privy Council under section 4 of the 1833 Act.<sup>4</sup> The formulation of the request would need some care but, if it was thought desirable, an opportunity for judicial creativity could be built into it. The Board might be asked what the boundary is between England and Scotland in the Solway Firth from Sark mouth to the closing line of the Firth, taking into account the fishing practices there. It is expected that the advice of the Board would go further to settle the argument than the decision in the Outer House, if only because, for the English fishermen, it would not appear as a decision founded in 'other people's law'.

<sup>1</sup> Rankine, *The Law of Land-ownership in Scotland* (4th edn., 1909), p. 322.

<sup>2</sup> 1953 S.L.T. 255.

<sup>3</sup> *Ibid.*, p. 263.

<sup>4</sup> Judicial Committee Act 1833.



# ADMISSION TO MEMBERSHIP IN INTERNATIONAL ORGANIZATIONS: THE CASE OF NAMIBIA\*

By EBERE OSIEKE<sup>1</sup>

## I. INTRODUCTION

THE interplay between law, politics and ideology appears to be more in evidence in admission to membership in international organizations than in any other area of international law. When considering the admission of a new Member, existing Members are likely to be influenced not only by the rules and procedures of the organization, and its objects and purposes, but also by political considerations such as the nature of the relations between the applicant and the Members, the degree of recognition accorded to the applicant by States, and the extent to which the government of the applicant conforms with the political philosophy or ideologies of the member States. In his individual opinion in the *Admissions* case,<sup>2</sup> Judge Azevedo alluded to the situation in the following terms:

... Motives of all kinds, tending to unite or separate men and countries, will slip through the remaining loopholes; all kinds of prejudices, and even physical repugnance will find a way of influencing the decision, either by an act of the will or even through the action of the subconscious. Each appraisal will be psychologically determined according to the criterion applied by each voter.<sup>3</sup>

Membership is further complicated by the absence of any general rule or principle applicable to all international organizations. Indeed, the law and practice of these institutions varies from one to the other. In some international organizations such as the United Nations (U.N.), the International Labour Organization (I.L.O.), the World Health Organization (W.H.O.), the United Nations Educational, Scientific and Cultural Organization (U.N.E.S.C.O.), the Intergovernmental Maritime Consultative Organization (I.M.C.O.), the International Atomic Energy Agency (I.A.E.A.) and the International Development Association (I.D.A.), full

\* © Dr. Ebere Osieke, 1981.

<sup>1</sup> LL.M., Ph.D. (London), Barrister; Member of the Legal Advisory Staff, International Labour Office, Geneva, Switzerland. The views expressed in this article are those of the writer.

<sup>2</sup> *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion of 28 May 1948: *I.C.J. Reports*, 1947-8, p. 57.

<sup>3</sup> *Ibid.*, p. 78. In their joint dissenting opinion, Judges Basdevant, Winiarski, Sir Arnold McNair and Read also stated that 'The admission of a new Member is pre-eminently a political act, and a political act of the greatest importance. The main function of a political organ is to examine questions in their political aspect, which means examining them from every point of view. It follows that the Members of such an organ who are responsible for forming its decisions must consider questions from every aspect, and, in consequence, are legally entitled to base their arguments and their vote upon political considerations . . .': *ibid.*, p. 85.

membership is reserved for 'States'.<sup>1</sup> In the Food and Agriculture Organization (F.A.O.) such membership is open to a 'nation',<sup>2</sup> and in the International Monetary Fund (I.M.F.), the International Bank for Reconstruction and Development (I.B.R.D.) and the International Finance Corporation (I.F.C.), the status of a full Member is open to a 'country'.<sup>3</sup> In the Universal Postal Union (U.P.U.), the International Telecommunications Union (I.T.U.) and the World Meteorological Organization (W.M.O.) non-autonomous territories may be admitted as full members;<sup>4</sup> and in certain organizations such as W.H.O., F.A.O., U.N.E.S.C.O., I.T.U. and I.M.C.O., non-independent territories may be admitted as Associate Members.<sup>5</sup> Furthermore, difficulties have also arisen from the fact that the constitutive instruments of the various organizations do not normally contain a definition of the stipulated criteria for the admission of new Members.

A new dimension has been added in recent years to this rather complex situation by a number of resolutions adopted in the United Nations concerning the admission of Namibia and the U.N. Council for Namibia<sup>6</sup> to full membership in international organizations and conferences. One of these resolutions (A/RES/32/9<sup>E</sup>) adopted by the General Assembly on 4 November 1977 provides, *inter alia*:<sup>7</sup>

3. *Requests* all specialized agencies and other organizations and conferences within the United Nations system to grant full membership to the United Nations

<sup>1</sup> See Articles 3 and 4 of the U.N. Charter; Article 1 (2) of the I.L.O. Constitution; Articles 3, 5 and 6 of the W.H.O. Constitution; Article 2 (2) of U.N.E.S.C.O. Constitution; Articles 91, 92 and 93 of the Chicago Convention; Articles 5, 7 and 8 of the I.M.C.O. Constitution; Article 4 of the I.A.E.A. Constitution; Article XI, Section 2 (c) and (d), of the I.D.A. Constitution.

<sup>2</sup> See Article 2 of the F.A.O. Constitution.

<sup>3</sup> See the Articles of Agreement of the I.M.F.: Article I, Sections 1 and 2; I.B.R.D.: Section 2 (c), (e) and (f); and I.F.C.: Article IX, Section 2 (c) and (d).

<sup>4</sup> See Article 2 of the U.P.U. Constitution; Article 1 and Annex 1 of the I.T.U. Constitution; and Article 3 of the W.M.O. Constitution. On the general question of participation of non-autonomous territories in international organizations, see Robert Kovar, 'La participation des territoires non autonomes aux organisations internationales', *Annuaire français de droit international*, 15 (1969), pp. 522-49; see also Schermers, *International Institutional Law*, vol. 1 (1972), pp. 29-30. On the application of the provisions of Article 26 (5) (c) of the General Agreement on Tariffs and Trade (G.A.T.T.) concerning the admission to membership of territories with full autonomy in the conduct of their external commercial relations, see Tatsuro Kunugi, 'State Succession in the Framework of GATT', *American Journal of International Law*, 59 (1965), pp. 271-5.

<sup>5</sup> See Article 8 of the W.H.O. Constitution; Article 2 (3)-(5) of the F.A.O. Constitution; Article 2 (3) of the U.N.E.S.C.O. Constitution; Article 1 (3) of the I.T.U. Constitution; and Article 9 of the I.M.C.O. Constitution.

<sup>6</sup> The United Nations Council for Namibia will henceforth be referred to as 'the U.N. Council for Namibia' or merely as 'the Council' where appropriate.

<sup>7</sup> This resolution was preceded by, among others, General Assembly Resolution A/RES/31/149 adopted on 20 December 1976, by 120 votes to none, with 7 abstentions, which in paragraph 3 requested 'all specialized agencies and other organizations and conferences within the United Nations system to consider granting full membership to the United Nations Council for Namibia so that it may participate in that capacity as the Administering Authority for Namibia in the work of these specialized agencies, organizations and conferences'. Paragraph 4 of the resolution also requested these agencies and conferences 'to consider favourably granting a waiver of the assessment of Namibia while it is represented by the United Nations Council for Namibia'. See also General Assembly Resolution 3111 (XXVIII) of 11 January 1974.

Council for Namibia so that it may participate in that capacity as the legal Administering Authority for Namibia in the work of those agencies, organizations and conferences;

4. *Requests* the specialized agencies and other organizations within the United Nations system to grant a waiver of the assessment of Namibia during the period in which Namibia is represented by the United Nations Council for Namibia;

5. *Requests* all intergovernmental and non-governmental organizations, bodies and conferences to ensure that the rights and interests of Namibia are protected and to invite the United Nations Council for Namibia to participate in their work, in its capacity as the legal Administering Authority for Namibia, wherever such rights and interests are involved; . . .

In a subsequent resolution adopted on 4 May 1978 (A/RES/S-9/2), the General Assembly declared that 'membership of the U.N. Council for Namibia in the specialized agencies and other organizations and bodies within the United Nations system, in conformity with the recommendations of the Assembly, is an indispensable element in the fulfilment of the responsibilities of the international community towards the people of Namibia, represented by the South West Africa People's Organization, their sole and authentic liberation movement . . .'.<sup>1</sup>

The primary purpose of these resolutions is to secure full membership in international organizations and conferences either for Namibia or for the U.N. Council for Namibia.<sup>2</sup> But since such membership is accorded in most of these bodies to 'States', 'nations' or 'countries',<sup>3</sup> and as Namibia and the U.N. Council for Namibia may not possess all the attributes of these entities,<sup>4</sup> the course of action advocated in these resolutions may have far-reaching implications for the law and practice of international organizations and international law generally. Thus the purpose of the present article is to examine these implications in the light of the legal status of the U.N. Council for Namibia and the Territory of Namibia, and the action that has been taken on the resolutions in certain international organizations and conferences.

<sup>1</sup> Res. A/RES/S-9/2, 4 May 1978, pp. 5-6.

<sup>2</sup> There appears to be some difficulty as to the exact meaning of these resolutions. It is clear from the express terms of paragraph 3 of the resolution of 4 November 1977 (A/RES/32/9<sup>E</sup>) and the resolution of 4 May 1978 (A/RES/S-9/2) that the request addressed to international organizations and conferences is to 'grant full membership to the United Nations Council for Namibia'. However, these entities are requested by operative paragraph 4 of the resolution of 4 November 1977 to grant a waiver of the 'assessment of Namibia' during the period in which 'Namibia is represented by the United Nations Council for Namibia'. This suggests that the purpose of the resolution is to secure the admission of Namibia to full membership, and that it should be represented by the U.N. Council for Namibia.

A further difficulty stems from operative paragraph 5 of the resolution of 4 November 1977 which requests 'all intergovernmental and non-governmental organizations, bodies and conferences' to ensure the protection of the rights and interests of Namibia and 'to invite' the U.N. Council for Namibia to participate in their work 'whenever such rights and interests are involved'. Since the specialized agencies are intergovernmental organizations, the question arises as to whether the provisions of paragraph 5 have also been addressed to them. In other words, should these entities act in accordance with the provisions of paragraph 5, instead of those of paragraph 3? This point has not yet been tested.

<sup>3</sup> See above, pp. 189-90.

<sup>4</sup> See below, p. 194 and p. 198.



## II. THE LEGAL STATUS OF THE U.N. COUNCIL FOR NAMIBIA

On 27 October 1966 the General Assembly of the United Nations adopted Resolution 2145 (XXI), by which it terminated the mandate of South Africa over Namibia and placed the Territory under the direct responsibility of the United Nations. In the following year, the General Assembly, by Resolution 2248 (S.V.) of 19 May 1967, created the United Nations Council for South West Africa, later renamed Namibia, comprising eleven member States,<sup>1</sup> and entrusted it with the following functions: (a) to administer South West Africa until independence, with the maximum participation of the inhabitants; (b) to promulgate legislation required for the administration of the Territory until a legislative assembly could be elected on the basis of universal adult suffrage; (c) to take immediate measures, in consultation with the inhabitants, to establish a constitutional assembly with the object of drawing up a constitution; (d) to maintain law and order; and (e) to transfer all powers to the people of the Territory following the declaration of independence.<sup>2</sup> Finally, the Assembly requested the Council to entrust executive and administrative tasks, as it deemed necessary, to a United Nations Commissioner for South West Africa.<sup>3</sup>

Although it has not been possible for the U.N. Council for Namibia to establish itself in Namibia as was envisaged by the General Assembly because of obstructions from the Government of South Africa,<sup>4</sup> it has been instrumental in instituting and administering a special U.N. Trust Fund for Namibia which has provided educational assistance for Namibians in exile. It has also been responsible for the establishment of the U.N. Institute for Namibia, which opened in Lusaka in August 1976; and it has for some time supervised the system of travel documents which it issues to Namibians and which have received the recognition of many countries for the purpose of travel and identity of Namibians abroad. The Council has also taken steps to preserve the natural resources of the Territory,

<sup>1</sup> The Council was subsequently enlarged pursuant to General Assembly Resolutions 3031 (XXVII) of 18 December 1972 and 3295 (XXIX) of 13 December 1974. At the end of 1979, the Council was composed of the following 25 members: Algeria, Australia, Bangladesh, Botswana, Burundi, Chile, China, Colombia, Egypt, Finland, Guyana, Haiti, India, Indonesia, Liberia, Mexico, Nigeria, Pakistan, Poland, Roumania, Senegal, Turkey, Union of Soviet Socialist Republics, Yugoslavia and Zambia.

<sup>2</sup> See Report of the U.N. Council for Namibia, vol. 1, *General Assembly Official Records*, 32nd Session, Suppl. No. 24 (A/32/24), p. 57.

<sup>3</sup> For the purpose of performing its functions, the Council has established a Steering Committee and three Standing Committees. The Steering Committee meets in closed session to discuss major policy issues and to consider and organize the procedures of the Council. It is composed of the President of the Council, the three Vice-Presidents, the Chairman of the three Standing Committees and the Rapporteur of the Committee on the United Nations Fund for Namibia. The terms of reference of the Standing Committees are to make recommendations to the Council on certain specified subjects. There is also a Committee on the United Nations Fund for Namibia, a Drafting Committee and a United Nations Commissioner for Namibia. See Report of the U.N. Council for Namibia, vol. 1, *General Assembly Official Records*, 32nd Session, Suppl. No. 24 (A/32/24), pp. 58-61.

<sup>4</sup> See Schermers, 'The Namibia Decree in National Courts', *International and Comparative Law Quarterly*, 26 (1977), p. 81.

principally by means of the enactment of a Decree which was subsequently endorsed by the General Assembly of the United Nations;<sup>1</sup> and it has represented Namibia in dealings with governments and in international bodies.<sup>2</sup>

Thus, in accordance with the relevant decisions of the General Assembly, and in actual practice, the powers and functions of the United Nations concerning the Territory of Namibia, on the basis of General Assembly Resolution 2145 (XXI) of 27 October 1966, are exercised on its behalf by the U.N. Council for Namibia. In the discharge of these responsibilities, the Council appears to act in a dual capacity—as an organ of the United Nations and as the legal Administering Authority for Namibia. This duality of status has been confirmed in a number of pronouncements within the United Nations<sup>3</sup> as well as in resolutions of the General Assembly,<sup>4</sup> in particular Resolution A/RES/32/9<sup>F</sup> of 11 November 1977 which stipulated the functions which the Council should exercise ‘as an organ of the United Nations’ and those it should undertake ‘as the legal Administering Authority for Namibia’.<sup>5</sup> However, the Council remains subject to the supervisory authority of the United

<sup>1</sup> Decree No. 1, for the Protection of the Natural Resources of Namibia, 27 September 1974. The Decree was approved by the General Assembly of the United Nations at its 29th Session on 13 December 1974. See United Nations, *Namibia Gazette*, No. 1. For an analysis of the legal effects of the Decree, see Schermers, ‘The Namibia Decree in National Courts’, loc. cit. (previous note).

<sup>2</sup> For more details of the various activities of the U.N. Council for Namibia especially in the field of labour, see *Labour and Discrimination in Namibia* (I.L.O., Geneva, 1977), pp. 3–4.

<sup>3</sup> See, for instance, the statement of the President of the U.N. Council for Namibia during the 1584th meeting of the U.N. Security Council, reproduced in Report of the U.N. Council for Namibia, *General Assembly Official Records*, 26th Session, Suppl. 24 (A/84/24), p. 20. See also pp. 20–1 of same Report for statements by the U.N. Council for Namibia.

<sup>4</sup> See Resolution 3111 (XXVIII) of 12 December 1973, Section II, operative paragraph 1; Resolution A/RES/31/149 of 20 December 1976, operative paragraphs 3 and 5.

<sup>5</sup> According to the resolution, the Council is requested to exercise, *inter alia*, the following functions ‘in the implementation of its responsibilities as an organ of the United Nations’: (a) to continue to mobilize international political support in order to press for the withdrawal of the illegal administration of South Africa from Namibia in accordance with United Nations resolutions on Namibia; (b) to maintain under continuous review the political, military, economic and social conditions affecting the struggle of the Namibian people for self-determination, freedom and national independence in a united Namibia; (c) to represent Namibia to ensure that the rights and interests of Namibia are protected, as appropriate, in all intergovernmental and non-governmental organizations, bodies and conferences; (d) to function as the policy-making organ of the United Nations in respect of Namibia.

On the other hand, the Council is requested to exercise, *inter alia*, the following functions ‘in the implementation of its responsibilities as the legal Administering Authority for Namibia’: (a) to hold a series of plenary meetings in Africa in 1978 at the highest possible level, as and when required for the further proper discharge of its functions; (b) to denounce all fraudulent constitutional schemes through which South Africa may attempt to perpetuate the colonial oppression and exploitation of the people and resources of Namibia; (c) to endeavour to ensure non-recognition of any administration installed in Windhoek not issuing from free elections in all of Namibia, under the supervision and control of the United Nations, in accordance with the Security Council Resolution 385 (1976) of 30 January 1976; (d) to protect the territorial integrity of Namibia, in particular by carrying out all possible activities denouncing the attempts of South Africa to annex Walvis Bay; (e) to consult with the South West Africa People’s Organization, as appropriate, in the formulation and implementation of its programme of work as well as in any matter of interest to the Namibian people: G.A. Res. A/RES/32/9<sup>F</sup> (11 November 1977), pp. 15–17.

Nations in the exercise of all its functions and powers—an authority underlined by the annual reports which it submits to the General Assembly on its activities, and which request the approval of the Assembly for its future activities.<sup>1</sup>

It seems evident from the international character of its functions and responsibilities that the U.N. Council for Namibia operates on the international plane,<sup>2</sup> but it does not appear to possess the attributes of a 'State', 'nation' or 'country',<sup>3</sup> which are essential criteria for full membership in many international organizations.<sup>4</sup> This does not mean, however, that the Council cannot participate in the proceedings of these agencies, for the Constitutions and Rules of Procedure of most of them contain provisions under which non-State entities can be represented in their proceedings by 'Observers', without the right to vote.<sup>5</sup> No doubt the

<sup>1</sup> See, for instance, Report of the U.N. Council for Namibia, vol. 1, *General Assembly Official Records*, 31st Session, Suppl. No. 24 (A/31/24), p. 79.

<sup>2</sup> Whether the U.N. Council for Namibia possesses a separate international legal personality is a difficult question. No doubt certain functions of the Council are international in character, but since it exercises them on behalf of the United Nations, which has general responsibility for the administration of the territory, it may be argued that it does not possess an autonomous international legal personality. It may also be argued, on the other hand, that the fact that the U.N. Council for Namibia exercises certain international functions with respect to the Territory of Namibia and maintains a certain degree of relations with members of the international community is in itself evidence of some form of international legal personality. For further discussion concerning the international legal personality of international organizations and organs, see generally J. L. Kunz, 'Privileges and Immunities of International Organizations', *American Journal of International Law*, 41 (1947), pp. 828, 854; Manuel Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations', this *Year Book*, 44 (1970), p. 111; Finn Seyersted, *Objective International Personality of International Organizations* (1963); Samuel Wex, 'The Legal Status of the International Joint Commission under International and Municipal Law', *Canadian Yearbook of International Law*, 16 (1978), pp. 276-303; see also Schwarzenberger and Brown, *Manual of International Law* (6th edn., 1976), p. 63; Brownlie, *Principles of Public International Law* (3rd edn., 1979) (henceforth referred to as Brownlie, *Principles*), pp. 677-81; and Schermers, *International Institutional Law*, vol. 2 (1972), pp. 622-41.

<sup>3</sup> The generally accepted definition of the term 'State' in international law was that laid down in Article 1 of the Montevideo Convention on the Rights and Duties of States 1933: 'The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states': see Hudson, *International Legislation*, vol. 6, p. 620; also *League of Nations Treaty Series*, vol. 165, p. 19. For an examination and evaluation of the criteria and elements of statehood, see James Crawford, 'The Criteria for Statehood in International Law', this *Year Book*, 48 (1976-7), pp. 93-182, and also *The Creation of States in International Law* (1979). See also Brownlie, *Principles*, pp. 73-7; and D. P. O'Connell, *International Law* (2nd edn., 1970), vol. 1, p. 284. For a discussion of the meaning of 'country', see Joseph Gold, *Membership and Non-Membership in the International Monetary Fund* (1974), pp. 43-52; and for a consideration of the meaning of 'nation' see J. L. Brierly, *The Law of Nations* (6th edn., revised by C. H. M. Waldock, 1963), pp. 126-8. See also below, pp. 210-11.

<sup>4</sup> It should be noted, however, that the I.A.E.A. is a full Member of the Middle Eastern Regional Radioisotope Centre for Arab countries. Its representatives have the right to vote and to be elected Chairman: *United Nations Treaty Series*, vol. 494, at p. 220; Finn Seyersted, 'International Personality of International Organisations', *Indian Journal of International Law*, 4 (1964), pp. 15-16; see also Henry Schermers, *International Institutional Law*, vol. 1 (1973), p. 32, and Chris Osakwe, 'Contemporary Soviet Doctrine on the Juridical Nature of Universal International Organizations', *American Journal of International Law*, 65 (1971), pp. 502-21, at p. 515.

<sup>5</sup> See, for instance, Article 12, paragraph 2, of the I.L.O. Constitution, and Articles 2 and 4 of the Standing Orders of the International Labour Conference; Article III, paragraph 5, of the Constitution



U.N. Council for Namibia, as an organ of the United Nations, could be granted the status of an 'Observer' in these organizations.<sup>1</sup> The Council could also represent Namibia, where appropriate, in its capacity as the legal Administering Authority for the Territory, on the basis of various resolutions of the General Assembly.<sup>2</sup>

While the representation of Namibia by the Council in these circumstances may be justified on the basis of resolutions of the General Assembly, it may be wondered whether it is in conflict with the role and status of the national liberation movement, the South West Africa People's Organisation (S.W.A.P.O.), which has been described in a number of resolutions of the main organs of the United Nations,<sup>3</sup> and the Organization of African Unity,<sup>4</sup> as the 'sole and authentic' representative of the 'Namibian people'. There may indeed be some contradictions in the conception of the United Nations regarding the respective roles of the U.N. Council for Namibia and the S.W.A.P.O., *vis-à-vis* representation of the Territory, but it seems apparent from certain resolutions of the General Assembly which request international organizations and conferences to allow both the U.N. Council for Namibia and the S.W.A.P.O. to participate in their proceedings 'when the rights and interests of Namibia are involved',<sup>5</sup> that the United Nations does not consider the representation of Namibia by the Council in international organizations as

of the F.A.O., and Resolution No. 44/57 of the 9th Session of the Conference; Article 70 of the Constitution of the W.H.O., and Rule 47 of the Rules of Procedure of the Health Assembly; and Article 45 of the Constitution of I.M.C.O., and Rule 4 of the Rules of Procedure of the Assembly. See also E. Suy, 'The Status of Observers in International Organizations', *Recueil des cours*, 160 (1978-II), pp. 79-179.

<sup>1</sup> Participation in international organizations as an 'Observer' would enable the U.N. Council for Namibia to fulfil some of its responsibilities such as the preparation (in accordance with the terms of General Assembly Resolution A/RES/31/149 of 20 December 1976), in consultation with specialized agencies and other organizations within the United Nations system in areas within their spheres of competence, of 'programmes of assistance to the people of Namibia and their liberation movement, the South West Africa People's Organisation'. See also General Assembly Resolution 3111 (XXVIII) of 12 December 1973, Section I, paragraph 14. Such participation would also be in conformity with General Assembly Resolution A/RES/32/9<sup>F</sup>, paragraph 2 (c), which requests the U.N. Council for Namibia, in the implementation of its responsibilities 'as an organ of the United Nations', to represent Namibia to ensure that the rights and interests of Namibia are protected, as appropriate, in all inter-governmental and non-governmental organizations, bodies and conferences.

<sup>2</sup> See, for example, G.A. Res. 3295 (XXIX) of 13 December 1974, Section VI, paragraph 1, which requests international organizations and conferences 'to take such steps as will enable the U.N. Council for Namibia to participate fully, on behalf of Namibia, in the work of those agencies and organizations'; and G.A. Res. 31/149 of 20 December 1976, and G.A. Res. 32/9<sup>E</sup> of 11 November 1977 which, *inter alia*, requests international organizations and conferences 'to consider favourably granting a waiver of the assessment of Namibia during the period in which Namibia is represented by the United Nations Council for Namibia'.

<sup>3</sup> See General Assembly Resolutions A/RES/31/146 (XXXI) of 4 February 1977, paragraph 2, and A/RES/32/39<sup>B</sup> of 11 November 1977, paragraph 10.

<sup>4</sup> See O.A.U. Council of Ministers Resolutions CM/RES. 629 (XXXI) of 1978, paragraph 3; and CM/PLEN/Dft. Res. 11 (XXXIII) adopted during the 33rd Ordinary Session (Monrovia, Liberia, 6-16 July 1979), Preamble.

<sup>5</sup> See, for instance, Res. 3295 (XXIX) of 13 December 1974, paragraph 2.

exclusive of representation of the Namibian people in the same bodies by the S.W.A.P.O.<sup>1</sup>

### III. THE LEGAL STATUS OF NAMIBIA<sup>2</sup>

Namibia is not yet an independent territory.<sup>3</sup> Thus the question to be considered at this stage is not so much whether it is a State,<sup>4</sup> but the extent to which its non-independent character constitutes an impediment to its admission into full membership in international organizations.

The generally accepted principle that independence<sup>5</sup> is an indispensable element in the notion of statehood for purposes of international law and relations<sup>6</sup> would appear to have influenced the practice in international

<sup>1</sup> In practice, the U.N. Council for Namibia and S.W.A.P.O. have been allowed to participate as separate entities in the proceedings of many international organizations, including the I.L.O., W.H.O., F.A.O., U.N.E.S.C.O., etc. However, as Namibia was admitted as a full Member of the I.L.O. in June 1978, to be represented by the U.N. Council for Namibia, the S.W.A.P.O. did not participate as a separate entity during the 65th Session of the International Labour Conference in June 1979, but its representatives were included as part of the delegation of the U.N. Council for Namibia.

<sup>2</sup> The legal status of Namibia has been the subject of so many studies that it is unnecessary to embark on an examination of the history and background of the territory. For further information on the subject, see Lawrence L. Hermann, 'The Legal Status of Namibia and of the United Nations Council for Namibia', *Canadian Yearbook of International Law*, 13 (1975), pp. 306-28; Solomon Slonim, *South West Africa and the United Nations: An International Mandate in Dispute* (Johns Hopkins University Press, 1973); John Dugard, *The South West Africa/Namibia Dispute* (University of California Press, 1973); I. Sagay, *The Legal Aspects of the Namibian Dispute* (1976); and T. Huaraka, *Namibia by Resolutions—a Legal Analysis of International Organisations' Attempts at Decolonisation* (unpublished Ph.D. thesis, No. 323, University of Geneva, 1979).

<sup>3</sup> The non-independent status of Namibia has been affirmed in numerous resolutions of the General Assembly and Security Council of the United Nations, as well as by the Council of Ministers and the Summit of the Heads of States of the Organization of African Unity. See, for instance, the following resolutions: General Assembly Resolution 2145 (XXI) of 27 October 1966 which terminated the Mandate of South Africa over the territory and affirmed that it is 'a territory having international status and that it shall maintain this status until it achieves independence' through free elections under the supervision and control of the United Nations; the O.A.U. Assembly of Heads of States Resolution AHG/Res. 86 (XV) of 1978 which reaffirmed its support of the U.N. Council for Namibia as the sole legal authority for the territory 'until its independence'; and O.A.U. Council of Ministers Res. CM/Res. 629 (XXXI) of 1978 which 'calls upon the Security Council of the United Nations to act decisively against any manoeuvres of the illegal occupation regime to frustrate the legitimate aspirations of the Namibian people to self-determination, freedom and national independence in a united Namibia'.

<sup>4</sup> See, however, pp. 199-200 below.

<sup>5</sup> The meaning of the term 'independence' has been the subject of learned comments and studies. According to Oppenheim: 'Sovereignty is supreme authority, an authority which is independent of any other earthly authority. Sovereignty in the strict and narrowest sense of the term implies, therefore, independence all round, within and without the borders of the country': *International Law*, vol. 1 (8th edn. by H. Lauterpacht, 1955), pp. 118-19. After examining the various authorities on the subject, Alfred M. Kamanda came to the conclusion that '... independence presupposes the existence of "internal sovereignty"'. For a state to be designated as an independent sovereign state directly subordinated to international law, its control of all persons and things within its territory must be complete and exclusive, and its external relations must be independent of the control of any other society': *A Study of the Legal Status of Protectorates in Public International Law* (Thèse No. 125 présentée à l'Université de Genève pour l'Obtention du Grade de Docteur ès Sciences Politiques, 1961), pp. 180-1. See also the much-quoted statement of Judge Max Huber in the *Island of Palmas* arbitration that 'sovereignty in the relations between States signifies independence': *Reports of International Arbitral Awards*, vol. 2, pp. 829 and 838 (1928). See also James Crawford, 'The Criteria for Statehood', loc. cit. above (p. 194 n. 3), for a review of the authorities.

<sup>6</sup> According to Brierly: 'The States with whose relations international law is primarily concerned are those which are "independent" in their external relations ...': *The Law of Nations* (6th edn., 1963),



organizations concerning admission of States to membership.<sup>1</sup> Most of these bodies, especially those that accord full membership to 'States', 'nations' and 'countries', have insisted that the applicant must be an independent State<sup>2</sup> and, on occasion, sovereign and independent States have been refused admission on the grounds that their 'independence is not genuine'.<sup>3</sup> The practice of the United Nations<sup>4</sup> on this issue has been succinctly stated by Goodrich, Hambro and Simons:

... the term 'state' is not used in the Charter in any narrow legal sense. During the debates on the admission of new members, there have been numerous instances, especially in the Security Council, in which questions have been raised as to whether an applicant was a truly sovereign, independent state.

On the one hand, doubt about the status of Outer Mongolia was a major factor in the initial failure of the Council to approve that country's application. On the other hand, the Soviet Union asserted that states such as Ceylon, Jordan, and Nepal, which had formerly been under British jurisdiction, could not be

p. 129. See also the *S.S. Lotus* case (1927), where the P.C.I.J. stated that 'international law governs relations between independent States': *P.C.I.J.*, Series A, No. 10, p. 18. See also R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), pp. 11-62 (referred to henceforth as Higgins, *Development*).

<sup>1</sup> There is no indication in the Constitutions of international organizations whether the applicant 'State', 'nation' or 'country' should be sovereign or independent. It becomes necessary, therefore, to rely almost exclusively on the practice of these entities.

<sup>2</sup> There were two exceptions to this general rule. The first was where some non-independent entities had participated in the inaugural conference of an international organization and were admitted as original members on the basis of the concept of 'acquired rights'. For instance, the membership provision of the League Covenant (Article 1) used the phrase 'any fully self-governing state, dominion or colony', but British India was named in the Annex as an original member, as were the Dominions of Canada and New Zealand and the Commonwealth of Australia and the Union of South Africa. Similarly, Byelorussia and the Ukraine, British India, the Philippines, Syria and Lebanon were admitted as original members of the United Nations, although they were not strictly 'States' in the international law sense. The second exception was where arrangements had already been made for the independence of the applicant State. In such cases, the State was granted admission, which became effective on the attainment of independence. Nigeria, Kenya, Ghana and the Bahamas were all admitted as members of the I.M.F. before independence, but the admission became effective only on the attainment of constitutional independence: see Joseph Gold, *Membership and Non-Membership in the International Monetary Fund* (1974), p. 60. For further examination of the practice of the League of Nations on admission to membership, see Manley O. Hudson, 'Membership in the League of Nations', *American Journal of International Law*, 18 (1924), p. 436, and 'The Members of the League of Nations', this *Year Book*, 16 (1935), p. 130; Lilian M. Friedlander, 'The Admission of States to the League of Nations', this *Year Book*, 9 (1928), p. 84. On the practice of the United Nations and other international organizations, see Higgins, *Development*, pp. 14-57; Goodrich, Hambro and Simons, *Charter of the United Nations* (3rd edn., 1969), pp. 81-7; D. P. O'Connell, *International Law* (2nd edn., 1970), vol. 1, pp. 286-301; Kelsen, *The Law of the United Nations* (1950), pp. 59-60.

<sup>3</sup> For instance, Mauritania became independent on 19 October 1960, but its application for admission to membership in the United Nations in November 1960 was vetoed in the Security Council of the United Nations by the delegate of the U.S.S.R. on the grounds, *inter alia*, that Mauritanian independence was illusory. Again, the application of Kuwait, which became independent on 19 June 1961, was also vetoed by the U.S.S.R. delegate in the Security Council of the United Nations in July 1961 for similar reasons; see, respectively, *Security Council Official Records*, Nos. 885-920, Doc. S/4567/Rev. 1, and *Security Council Official Records*, 16th year, Suppl. July, August and September 1961, Doc. S/1852, p. 19.

<sup>4</sup> For the practice in other international organizations, see Higgins, *Development*, pp. 42-57.



considered independent states because of the nature of their continuing ties with London. In 1952 the Soviet Union similarly judged as unqualified for United Nations membership the 'Associated States of Indochina—Cambodia, Laos and Viet Nam—which, in the Soviet view, were not sovereign states but 'French puppets'. At the same time, France charged that the Democratic Republic of Viet Nam was so completely lacking in the necessary qualifications that its application for membership should not even be considered. The applications of the Republic of Korea and the People's Democratic Republic of Korea prompted a similar series of charges concerning their status.<sup>1</sup>

The principle that only independent and sovereign States should be admitted to full membership is not limited to universal international organizations, but applies equally in regional international organizations. The Charter of the Organization of African Unity (O.A.U.), after stating in Article 3 that the member States affirm and declare their adherence to the principles, *inter alia*, of 'the sovereign equality of all Member States', and 'respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence', stipulates in Article 4 that 'Each independent sovereign African State shall be entitled to become a Member of the Organization'.<sup>2</sup> Similarly, the Charter of the Organization of American States (O.A.S.), after declaring that the American States reaffirm the principle that 'international law is the standard of conduct of states in their reciprocal relations', stipulates in Article 4 that 'all American States that ratify the present Charter are members of the Organization', and in Article 6 that 'any other independent American State that desires to become a member of the Organization should so indicate by means of a note addressed to the Secretary-General . . .'.<sup>3</sup>

It would appear, therefore, that 'independence' or 'sovereignty' is an essential attribute of statehood for purposes of full membership in most international organizations, both universal and regional;<sup>4</sup> and the non-independent status of Namibia could be regarded by some international organizations as an obstacle to its admission as a full member. Professor Tunkin has endeavoured to explain the rationale behind the general law and practice of international organizations on this point:

One of the most important laws of the development of mankind in our epoch

<sup>1</sup> *Charter of the United Nations* (3rd edn., 1969), pp. 88–9.

<sup>2</sup> On this point, see also T. O. Elias, *Africa and the Development of International Law* (1972), p. 129.

<sup>3</sup> See Charter of the Organization of American States as amended by the Protocol of Buenos Aires in 1967: Treaty Series I-C, *O.A.S. Official Records* (General Secretariat, O.A.S., Washington D.C., 1970). See also Peaslee, *International Governmental Organizations* (rev. 3rd edn., 1974), p. 1183. Under the Pact of the League of Arab States, the League 'is composed of the independent Arab States which have signed' the Pact and 'any independent Arab State has the right to become a member of the League'; see Peaslee, *op. cit.*, p. 1117; see also Article 2 of the Statute of the Council of Europe, and the Preamble and Articles 1 and 6 of the Treaty establishing the E.E.C.

<sup>4</sup> After examining the practice of the League of Nations and the United Nations on this matter, Professor O'Connell concluded: 'Both the Covenant of the League of Nations and the Charter of the United Nations provided for membership of States, and it is clearly the intention of these documents that only fully sovereign States possessed of capacity to fulfil the obligations of membership are qualified for admission': *International Law* (2nd edn., 1970), vol. 1, p. 285.

which has direct relation to international organizations is the existence of sovereign states.

This law of societal development can be felt in all international organizations. Its basic manifestation is the principle of sovereign equality of the member states, which is itself the guiding principle of the structure and activity of contemporary general international organizations.

The sovereignty of member states of an international organization is reflected first and foremost in the fact that contemporary general international organizations are created and operate on the basis of charters which are international treaties concluded by sovereign states.<sup>1</sup>

Although not an independent sovereign State, it has been generally accepted within the United Nations that Namibia is a territory with international status; and some legal authorities have pointed out that international law may come into play with respect to certain entities even before they attain independence. According to Professor R. Y. Jennings:

. . . A new State is usually born either of an evolution within the sphere of constitutional law or of civil strife. In either event it is, at least according to traditional international law, a matter solely within the domestic sphere until the moment when recognition in one form or another comes into question. And this, of course, is precisely the reason why the mode of transfer of territorial sovereignty in this case is a matter of indifference to traditional international law; because the acquisition of territorial sovereignty in this case is by facts or legal processes or both working behind the screen of the domestic jurisdiction, and therefore proper to municipal law rather than international law. It is recognition which marks the emergence of this complex of law and fact into the international sphere; but recognition by definition is a procedure by which the factual situation is acknowledged as bearing title. The new State brings its title with it, so to speak, as it steps into the realm of international law.

Such is the position in what we may call the traditional law. We may note, however, that international law and organization have begun to build important salients into this traditionally domestic sphere in which the new State is usually born. The mandates system under the League of Nations and the Trusteeship system under the United Nations are obviously important areas where international law comes in, so to speak, before the final emergence of any new State. Again, Chapter XI of the Charter of the United Nations—the *Declaration regarding Non-self-governing Territories*—brings in international law and organization at a stage before a new State may be born. . . .<sup>2</sup>

To what extent, therefore, has international law come into play as regards Namibia's eligibility for admission to membership in international organizations? Or, to put it another way, could Namibia, because of its present international status, be treated as *sui generis* for purposes of admission to full membership in international organizations?

Namibia possesses two of the essential attributes of statehood—a

<sup>1</sup> *Theory of International Law* (1974), pp. 319–20.

<sup>2</sup> Jennings, *The Acquisition of Territory in International Law* (1963), pp. 8–9; see also the separate opinion of Judge McNair in the *International Status of South West Africa*, *I.C.J. Reports*, 1950, pp. 128 and 150.

permanent population and a defined territory.<sup>1</sup> But whether it has a government in the generally accepted sense,<sup>2</sup> and is responsible for the direction of its external relations, may give rise to some controversy. Undoubtedly, the U.N. Council for Namibia, as the legal Administering Authority for the Territory, exercises certain governmental functions with respect to Namibia, but many people would hesitate to regard it as the 'government' of Namibia, especially as such a status has never been attributed to it in any resolution of the General Assembly or the Security Council of the United Nations or of the main bodies of the Organization of African Unity.<sup>3</sup> It is true also that the U.N. Council for Namibia exercises certain functions pertaining to the external relations of Namibia, but as its activities are exercised on behalf of the United Nations and subject to the over-all authority of the General Assembly, it may be argued that it does not possess exclusive competence as regards the direction of the foreign relations of Namibia. In fact such competence would appear to be vested in the United Nations itself, which is a separate entity from Namibia.

Thus, although Namibia may be *sui generis* for certain purposes in international law,<sup>4</sup> it may not be able, because of its 'imperfect' international personality and absence of full sovereignty, to operate on the same plane as fully sovereign independent States in most international organizations, both as regards adherence to the fundamental principle of the sovereign equality of the member States, and in the discharge of the obligations and enjoyment of the rights of full membership.

#### IV. ACTION BY INTERNATIONAL ORGANIZATIONS AND CONFERENCES

Over the past few years, action has been taken in a number of international organizations and conferences on the question of the

<sup>1</sup> For the generally accepted criteria for statehood in international law see above, p. 194 n. 3.

<sup>2</sup> For a discussion of governmental structures, see Dragnich and Rasmussen, *Major European Governments* (4th edn., 1974), pp. 27-33; Douglas Verney, *The Analysis of Political Systems* (1959); Ferrel Heady, *Public Administration: A Comparative Perspective* (1966); and Ivo Duchacek, *Comparative Federalism* (1970).

<sup>3</sup> See, however, the resolution adopted by the 64th Session of the International Labour Conference, June 1978, in which the U.N. Council for Namibia is to be regarded as 'the government' of Namibia for the purpose of the application of the Constitution of the I.L.O. (below, pp. 214-15).

<sup>4</sup> It is debatable whether Namibia qualifies as 'a not-full sovereign State' in the sense in which that phrase has been employed by Oppenheim. It may be argued that since the administration of the Territory is the responsibility of the United Nations, Namibia does not itself possess supreme authority or independence with regard to a part of the functions of a State, unless, of course, the United Nations is assimilable to Namibia for the purposes of the exercise of governmental functions. Oppenheim had this to say on 'not-full sovereign States':

'... Yet, there are States in existence which certainly do not possess full sovereignty, and are therefore named not-full sovereign States. All States which are under the suzerainty or under the protectorate of another State, or are member-States of a so-called federal State, belong to this group. All of them possess supreme authority and independence with regard to a part of the functions of a State, whereas with regard to another part they are under the authority of another State. This fact explains the doubt as to whether such not-full sovereign States can be International Persons and subjects of the Law of Nations at all.

'That they cannot be full, perfect, and normal subjects of International Law there is no doubt. But it



membership of Namibia and the U.N. Council for Namibia, on the basis of the resolutions of the General Assembly. The pertinent proceedings will now be examined, starting with international conferences.<sup>1</sup>

1. *United Nations Conference on the Succession of States in respect of Treaties, Vienna, 4 April–6 May 1977*

The Rules of Procedure adopted by the U.N. Conference on Succession of States in respect of Treaties at its first plenary meeting on 4 April 1977 contain the following provisions concerning the participation of representatives of United Nations organs and agencies:

Representatives designated by organs of the United Nations, the specialized agencies, and the International Atomic Energy Agency may participate as observers, without the right to vote, in the deliberations of the Conference, the Committee of the Whole and, as appropriate, other committees, sub-committees or working groups.<sup>2</sup>

During the third plenary meeting of the Conference, the President stated that in a letter of 6 April 1977 addressed to him, and in an oral communication the following day, the delegation of the U.N. Council for Namibia had requested the Conference to make the following arrangements in order to ensure its active participation therein:<sup>3</sup>

... the delegation concerned should be seated with the delegations of States, albeit after them; it should have the right to make statements at meetings of the Committee of the Whole and of the Conference; and such statements should appear in the summary records and should be reflected, where necessary and appropriate, in the report of the Committee of the Whole to the Conference.<sup>4</sup>

At the suggestion of the President, the Conference unanimously decided to include on its agenda the request of the U.N. Council for Namibia for 'active' participation in the Conference.

This item gave rise to some controversy during its consideration in the plenary of the Conference. Opinion was divided as to whether the U.N. Council for Namibia should have the right to submit proposals and amendments. Although no delegate raised an objection when the Conference

is inaccurate to maintain that they can have no international position whatever. They often enjoy in many respects the rights and fulfil in other points the duties, of International Persons. Such imperfect International Personality is, to some extent, an anomaly; but the very existence of States without full sovereignty is an anomaly in itself': *International Law*, vol. 1 (8th edn. by Lauterpacht, 1955), p. 119.

<sup>1</sup> Although the question of the participation of the U.N. Council for Namibia has been raised in a number of international conferences, it suffices here to deal only with two of them, i.e. the U.N. Conference on the Succession of States in respect of Treaties and the Third United Nations Conference on the Law of the Sea. For details of the participation of the U.N. Council for Namibia at the U.N. Water Conference (14–25 March 1977), World Conference for Action Against Apartheid (22–6 August 1977), the U.N. Conference on Desertification (29 August–9 September 1977) and the 7th Session of the U.N. Conference on the Standardisation of Geographical Names (17 August–7 September 1977), see Report of the U.N. Council for Namibia, vol. 1, *General Assembly Official Records*, 32nd Session, Suppl. No. 24 (A/32/24), pp. 17 and 20–1 respectively.

<sup>2</sup> *U.N. Conference on Succession of States in respect of Treaties, First Session, Vienna, 4 April–6 May 1977: Official Records*, vol. 1, p. xviii.

<sup>3</sup> The President explained that the request had been made on the basis of General Assembly Resolution 31/149 of 20 December 1976 (see above, p. 190 n. 7, for the text of the resolution).

<sup>4</sup> *U.N. Conference on Succession of States in respect of Treaties, Official Records*, vol. 1, pp. 4–5.

decided, on the suggestion of the President, to grant such a right to the Council, a number of delegates<sup>1</sup> stated afterwards that if the proposal had been put to the vote they would have been obliged to abstain on the grounds, *inter alia*, that the right to submit proposals and amendments was appropriate only for the government of a State, particularly since the Conference was in fact preparing an instrument which concerned the succession of States, and should not be granted to a subsidiary organ of the General Assembly, such as the U.N. Council for Namibia; and that the Council had, in any case, been invited to participate in the Conference as 'observer'.<sup>2</sup> The decision adopted by the Conference was, however, supported by many delegates,<sup>3</sup> who maintained that the U.N. Council for Namibia enjoyed certain rights conceded to it by the General Assembly, whose authority could not be called into question. These delegates considered, moreover, that by acceding to the request of the delegation of the U.N. Council for Namibia the Conference had not set a precedent, since that delegation had already participated in international conferences, in particular, the U.N. Water Conference,<sup>4</sup> and that the decision of the Conference was a victory in the struggle waged for many years by the oppressed people of Namibia and should, it must be hoped, mark the beginning of the effective recognition of all the rights of the U.N. Council for Namibia.

There were also divergences of opinion concerning the nature of participation to be accorded to the U.N. Council for Namibia. After the decision to grant it 'active' participation in the proceedings of the Conference, some delegates asserted that, since the Council had expressly requested 'full' participation in the Conference, the word 'active' in the text of the Conference decision should be replaced by 'full' in order to comply with its wishes.<sup>5</sup> Some other delegates<sup>6</sup> expressed surprise that an attempt was being made to reopen a matter on which the Conference had adopted a unanimous decision. They pointed out that the letters from the U.N. Council for Namibia to the President of the Conference referred to both 'full' and 'active' participation by the Council, and that under the Rules of Procedure any proposal to change the decision of the Conference should be adopted by a two-thirds majority.

A question was also raised as to whether the delegation of the U.N. Council for Namibia should have the right to vote. As a result of the statement by the delegate of Niger that the participation of the Council

<sup>1</sup> These included the delegates from the United Kingdom, the Federal Republic of Germany, France, the Netherlands, Switzerland, Belgium and the United States: *U.N. Conference on Succession of States in respect of Treaties, Official Records*, vol. 1, pp. 5-7.

<sup>2</sup> Ibid.

<sup>3</sup> These included the delegates from Niger, Tanzania, Ethiopia, Sri Lanka, Guyana, Egypt, Yugoslavia, Kenya, Roumania, Zaïre, Cuba, Ghana and Uganda: *ibid.*, pp. 6-8.

<sup>4</sup> For the report of the U.N. Council for Namibia concerning its participation at the U.N. Water Conference held in Mar del Plata from 14 to 25 March 1977, see Report of the U.N. Council for Namibia, vol. 2, *General Assembly Official Records*, 32nd Session, Suppl. No. 24 (A/32/24), pp. 87-92.

<sup>5</sup> See the statements by the delegates of Sri Lanka, Tanzania, Algeria, Guyana, Kenya and Senegal: *U.N. Conference on Succession of States in respect of Treaties, Official Records*, vol. 1, pp. 15-17.

<sup>6</sup> These included delegates from the U.K., U.S.A., France and U.S.S.R.: see *ibid.*, pp. 17-19.

'must be full and complete',<sup>1</sup> the delegate of Senegal observed that the question of the Council's right to vote had to be settled.<sup>2</sup> The delegate of France stated that the Conference had not granted the right to vote to the U.N. Council for Namibia because under Rule 33 of the Rules of Procedure of the Conference 'States alone enjoyed the right to vote'.<sup>3</sup> The delegate of the United States of America added that the Conference had taken decisions only on the seating of the delegation of the U.N. Council for Namibia in the conference room and on the right of that delegation to submit proposals and amendments.<sup>4</sup>

After consultations between the various regional groups, agreement was reached that the decision of the Conference should be recast in two separate paragraphs to indicate that, after considering the request of the U.N. Council for Namibia 'for active participation' in the Conference, 'the Conference took a decision in favour of participation as requested by the U.N. Council for Namibia'; and that in the context of the implementation of that decision the Conference further decided 'that the delegation of the UN Council for Namibia has the right to submit proposals and amendments'.<sup>5</sup>

The foregoing proceedings call for some observations. Although, under Rule 60 of the Rules of Procedure of the Conference, representatives of international organizations may participate in its proceedings as observers, 'without the right to vote', there is nothing in the Rules which prohibits them from making statements or submitting proposals and amendments. Therefore, the grant of these rights to the delegation of the U.N. Council for Namibia would not appear to be incompatible with the status of an 'observer' under the Rules of Procedure. But, by allowing the delegation of the U.N. Council for Namibia 'to be seated with the delegations of States, albeit after them', the Conference appeared to have granted a special status to the Council as regards participation in its proceedings.

However, paragraph 3 of General Assembly Resolution 31/149 of 20 December 1976, on which the request of the U.N. Council for Namibia to participate at the Conference was based, requested all 'conferences within the United Nations system to consider granting full membership' to the Council.<sup>6</sup> Although it is not clear what 'full membership' means in this context, the Rules of Procedure of the Conference contain some provisions under which the delegations of States—which participate as full members—are to be admitted into the Conference, as well as describing their rights. According to Rule 3, the credentials of the delegation of each State 'shall be issued either by the Head of State or Government or by the Minister for Foreign Affairs', and under Rule 33 'each State represented at the Conference shall have one vote'.<sup>7</sup> Since there was no amendment to the Rules of Procedure to enable the provisions which applied to participating

<sup>1</sup> Ibid., p. 16.

<sup>2</sup> Ibid., p. 16.

<sup>3</sup> Ibid., p. 17.

<sup>4</sup> Ibid., p. 16.

<sup>5</sup> Ibid., pp. 17-18.

<sup>6</sup> See above, p. 190 n. 7.

<sup>7</sup> See also Rule 17 under which a meeting of the General Committee may be declared open when representatives of at least one-third of the States participating in the Conference are present. See Rule 49 for similar provisions with respect to meetings of other committees.



States to apply equally to the U.N. Council for Namibia, and as the Conference did not take any express decision to grant to the delegation of the Council the right to vote, even though the matter was raised by some delegates, it is evident that the Conference did not grant to the Council the same rights as those enjoyed by the States participating as full members. Nor was it essential to do so. It was only necessary to grant to the U.N. Council for Namibia a status which would enable it to discharge its mandate which, in this case, was to ensure 'that the Conference took decisions in accordance with the interests of the Namibian people by reserving its right to sign the Convention'.<sup>1</sup> In fact, in a statement made in the plenary of the Conference, a member of the delegation of the U.N. Council for Namibia stated that 'the decision taken by the Conference at its third meeting on 14 April 1977 was therefore entirely in accordance with paragraph 3 of General Assembly resolution 31/149 . . .',<sup>2</sup> and in the Report to the General Assembly on its activities at the Conference, the delegation of the U.N. Council for Namibia concluded that 'its active participation in the work of the Conference has to date ensured that the envisaged final Convention, at the present stage of preparation, does not contain articles or provisions which would be prejudicial to the interests of an independent Namibia'.<sup>3</sup> That was the essence of the participation at the Conference by the U.N. Council for Namibia.

## 2. *Third United Nations Conference on the Law of the Sea (UNCLOS III)*

From the outset, it was anticipated that the U.N. Council for Namibia should be allowed to send representatives to participate in the deliberations of the Third United Nations Conference on the Law of the Sea (UNCLOS III). The draft Rules of Procedure of the Conference, which were prepared by the Secretary-General of the United Nations in compliance with General Assembly Resolution 3067 (XXVIII) of 16 November 1973, contained provisions under which the U.N. Council for Namibia could designate representatives to participate, without the right to vote, in the deliberations of the Conference and its committees and subsidiary organs and to circulate written statements.<sup>4</sup>

During the First Session of the Conference the draft Rules prepared by the Secretary-General were revised on the basis of a proposal submitted by the Government of Pakistan.<sup>5</sup> Article 62 of the Rules of Procedure of the Conference now provides, under the heading 'OBSERVERS':

1. The United Nations Council for Namibia may designate representatives

<sup>1</sup> See Report of the U.N. Council for Namibia to the General Assembly, vol. 2, *General Assembly Official Records*, 32nd Session, Suppl. No. 24 (A/32/24), p. 103.

<sup>2</sup> *U.N. Conference on Succession of States in respect of Treaties*, *Official Records*, vol. 1, p. 7.

<sup>3</sup> Report of the U.N. Council for Namibia, vol. 2, *General Assembly Official Records*, 32nd Session, Suppl. No. 24 (A/32/24), p. 98.

<sup>4</sup> See *UNCLOS III*, *Official Records* (First Session, New York, December 1973; 2nd Session, Caracas, June–August 1974), vol. 3, Documents of the Conference, Doc. A/CONF/62, p. 79.

<sup>5</sup> See Doc. A/CONF/62/20, *ibid.*, p. 79.

to participate, without the right to vote, in the deliberations of the Conference and the main committees, and, as appropriate, the subsidiary organs.

2. Written statements of the Council shall be distributed by the secretariat to the delegations at the Conference.

The representatives designated by the U.N. Council for Namibia were allowed to participate at the first five sessions of the Conference in accordance with the terms of these Rules. However, during the Sixth Session (28 May–8 July 1977, New York) the President informed the Conference that he had received a letter dated 17 May 1977 from the Acting President of the U.N. Council for Namibia expressing the desire to participate in the Sixth Session of the Conference with full status. He explained that the request was based on General Assembly Resolution 31/149<sup>1</sup> and that at earlier sessions the Council had participated at the Conference on the basis of Rule 62 of the Rules of Procedure. He said that if he heard no objection, he would take it that the Conference agreed that the Council should be invited to participate fully in its work: 'the delegation of the Council should be seated with the delegations of States; would have the right to make statements at meetings of the plenary and the committees which would appear in the Summary Records and at informal meetings as well; and the Secretariat would continue to distribute any written statement and any informal proposals or suggestions from the Council in accordance with its wishes.' These proposals were accepted by the Conference without objection.<sup>2</sup>

The proceedings in this case also call for some comments. First, by allowing its delegation to sit with the delegations of States, the Conference appeared also to have granted a special status to the U.N. Council for Namibia. It should, however, be pointed out that the President did not make any reference in his statement to the right to vote. This seems to imply that the U.N. Council for Namibia was not granted that right and, consequently, it does not have the same rights as the sovereign States participating in the Conference. In fact, its status does not appear to be substantially different from that envisaged in the Rules of Procedure of the Conference.

Secondly, under Article 62 of these Rules, the Secretariat is to distribute 'written statements' of the U.N. Council to the 'delegations' at the Conference. In the President's statement, the distribution was extended to 'informal proposals and suggestions', and was to be made 'in accordance with the wishes of the Council'. This is obviously a significant extension of the rights granted to the Council under Article 62 and it is surprising that these rules were not modified to incorporate the additional rights.

### 3. *Action in the World Health Organisation (W.H.O.)*

The Constitution of the W.H.O. contains provisions concerning

<sup>1</sup> See above, p. 190 n. 7, for the text of the resolution.

<sup>2</sup> See *UNCLOS III, Official Records* (Sixth Session, New York, 23 May–15 July 1977), vol. 7, p. 4.

admission to membership in the Organization. Article 3 stipulates that 'Membership . . . shall be open to all States', and Articles 4 and 5 contain provisions as to how Members of the United Nations and the States whose governments were invited to send observers to the International Health Conference held in New York, 1946, may become Members of the Organization. Article 6 then provides that ' . . . States which do not become Members in accordance with Articles 4 and 5 may apply to become Members and shall be admitted as Members when their application has been approved by a simple majority vote of the Health Assembly'.<sup>1</sup>

Under Article 8, territories or groups of territories which are not responsible for the conduct of their international relations may be admitted as Associate Members by the Health Assembly upon application made on behalf of such territory or group of territories by the Member or other authority having responsibility for their international relations. According to the Article, the nature and extent of the rights and obligations of Associate Members shall be determined by the Health Assembly.<sup>2</sup>

Pursuant to Article 8 of the Constitution of the W.H.O., Namibia was admitted as an Associate Member of the W.H.O. by the Twenty-Seventh Health Assembly in 1974 upon the request of the U.N. Council for Namibia.<sup>3</sup> Its financial contribution was assessed at one-third of 0.02 per cent for 1974 and at 0.01 per cent for 1975 and subsequent years on the basis of resolution WHA 27.9,<sup>4</sup> which reduced the assessment of Associate Members from 0.02 to 0.01 per cent.

In August 1975 the Director-General of the W.H.O. received a request from the Commissioner for Namibia, acting on behalf of the U.N. Council for Namibia and the Secretary-General of the United Nations, for a waiver of the assessment of Namibia until such time as it acceded to independence. The request was submitted to the Executive Board at its 57th Session. After considering the matter, the Board noted the special situation of Namibia as a territory in respect of which the United Nations has assumed direct responsibilities and recommended to the Twenty-Ninth World Health Assembly to confirm the assessment of Namibia and urge the United Nations to make continuing provision for payment of the assessed contributions of Namibia.<sup>5</sup> The W.H.A. concurred with the Executive Board's recommendation.<sup>6</sup>

In January 1977 the Director-General of the W.H.O. submitted a report<sup>7</sup> to the 59th Session of the Executive Board drawing its attention to

<sup>1</sup> See *Basic Documents of the W.H.O.* (Geneva, 1974), pp. 3-4.

<sup>2</sup> *Ibid.*, p. 4.

<sup>3</sup> See Resolution WHA 27.3 of 1974.

<sup>4</sup> See Resolutions WHA 27.39 and WHA 27.9 respectively in W.H.O., *Handbook of Resolutions and Decisions*, vol. 2 (1975), p. 55.

<sup>5</sup> See Resolution EB 57.R14, *W.H.O. Official Records*, No. 231, 1976, p. 9; also Doc. EB 59/41, 59th Session of the Executive Board, 10 January 1977, p. 2.

<sup>6</sup> See Resolution WHA 29.13, *W.H.O. Official Records*, No. 233, 1976, p. 6.

<sup>7</sup> Doc. EB 59/41, 59th Session of the Executive Board, 10 January 1977.



Resolution 31/149 (XXXI) of the General Assembly of the United Nations.<sup>1</sup> After examining the matter, the Executive Board recommended to the Thirtieth World Health Assembly 'to exempt Namibia from payment of its assessed contributions for 1978 and subsequent years until the year it accedes to full Membership of the World Health Organization and authorize the Director-General to finance those contributions from available casual income'. The Executive Board made no recommendation on the question of granting full membership to the U.N. Council for Namibia.<sup>2</sup>

In his statement at the 30th Session of the W.H.A. in May 1977 the representative of the U.N. Council for Namibia, Mr. Zacharie Banyiyesako of Burundi, drew attention to General Assembly Resolution 31/149 of 20 December 1976 and requested the Health Assembly to re-examine the status of the Council with a view to granting it full membership in the W.H.O.:

Monsieur le Président, j'ai reçu des instructions du Conseil de demander à la présente session de bien vouloir réexaminer le Statut du Conseil des Nations Unies pour la Namibie au sein de l'Organisation mondiale de la Santé afin que le Conseil, en tant qu'organe légal chargé d'administrer la Namibie jusqu'à l'indépendance, obtienne le statut de Membre de plein droit de l'OMS étant donné la responsabilité particulière du système des Nations Unies à l'égard de la Namibie.<sup>3</sup>

However, the W.H.A. adopted the recommendation of the Executive Board concerning the waiver of the assessment of Namibia and took no action on the question of granting full membership in the Organization to the U.N. Council for Namibia.<sup>4</sup>

It is a pity that there was no formal discussion in the W.H.O. on the question of granting full membership to Namibia. However, it would appear from its action—dealing only with the waiver of Namibia's assessment—that the W.H.A. considered that the status of Namibia as an Associate Member in the Organization was sufficient for the protection of the interests of the Namibian people, as well as of the U.N. Council for Namibia. Indeed, Namibia's Associate Membership in the W.H.O. means that the facilities and services of the Organization will be made available to its nationals, and its representatives can participate in the proceedings and debates, albeit without a vote, in the Health Assembly

<sup>1</sup> See above, p. 190 n. 7, for text of the resolution.

<sup>2</sup> Res. EB 59.R44 of 27 January 1977. The resolution, in its Preamble, referred only to the waiver of the assessment of Namibia and made no mention of the request for full membership of the U.N. Council for Namibia: 'Having considered Res. 31/149 of the U.N. General Assembly, requesting the specialized agencies and other organizations within the U.N. system to consider favourably granting a waiver of the assessment of Namibia during the period in which the U.N. Council for Namibia is responsible for the international relations of Namibia; . . . DECIDES to recommend to the Thirtieth World Health Assembly . . . '.

<sup>3</sup> 30th World Health Assembly, Doc. A30/VR/8 of 10 May 1977, p. 23; see also Report of the U.N. Council for Namibia, vol. 2, *General Assembly Official Records*, 32nd Session, Suppl. No. 24 (A/32/24), pp. 105-7.

<sup>4</sup> See Resolution WHA 30.29 of 16 May 1977, Doc. A30/V/12.

and its main committees, and may vote and hold offices in other committees and subcommittees of the Assembly.<sup>1</sup> Equally significant is the fact that the right has been reserved for an independent and sovereign Namibia to decide whether or not it wishes to become a full Member of the W.H.O. and, if so, the appropriate time to do so.

#### 4. *Action in the Food and Agriculture Organization (F.A.O.)*

Admission to membership in the F.A.O. is provided for in Article II of its Constitution. Paragraph 2 of this Article authorizes the Conference 'by a two-thirds majority of the votes cast, provided that a majority of the Member Nations of the Organization is present' to decide to admit as 'an additional Member of the Organization any Nation which has submitted an application for membership and a declaration made in a formal instrument that it will accept the obligations of the Constitution as in force at the time of admission'. Paragraph 3 of Article II then provides for the admission as an Associate Member of the Organization, under the same conditions regarding the required majority and quorum prescribed in paragraph 2, of 'any territory or group of territories which is not responsible for the conduct of its international relations upon application made on its behalf by the Member Nation or Authority having responsibility for its international relations'.<sup>2</sup>

On 29 September 1977 the President of the U.N. Council for Namibia wrote to the Director-General of the F.A.O. informing him that 'at its meeting on 11 May 1977 the Council for Namibia decided to apply for full membership of the Food and Agriculture Organization' pursuant to paragraph 3 of General Assembly Resolution 31/149 of 20 December 1976. The letter invited the comments of the Director-General of the F.A.O. on paragraph 4 of the same resolution.<sup>3</sup>

The U.N. Council for Namibia's application for full membership in the F.A.O. was presented to the 19th Session of the F.A.O. Conference (12 November–1 December 1977). The matter was first discussed by the General Committee at a private meeting in accordance with Rule X of the Rules of the Conference. On completion of its deliberations, the Committee recommended the admission of Namibia, to be represented by the U.N. Council for Namibia. As the Council did not press for a waiver of assessment,<sup>4</sup> the General Committee recommended the same assessment for Namibia as for the other candidates for admission.<sup>5</sup>

<sup>1</sup> For full details of the rights and obligations of Associate Members in the W.H.O., see *Basic Documents of the W.H.O.* (1974), pp. 19–20.

<sup>2</sup> See *Basic Texts of the F.A.O.*, vols. 1 and 2 (1970 edition), p. 4.

<sup>3</sup> See above (p. 190 n. 7) for the text of this resolution.

<sup>4</sup> See *19th Session of the F.A.O. Conference, 12 November–1 December 1977*, Doc. C.77/14-Suppl. 1, November 1977. As is the case for all applications for membership, the member nations of F.A.O. were informed of the U.N. Council for Namibia's application by circular letter (Ref. G/CA-11/3) of 20 October 1977: see Doc. C.77/14-Suppl. 1, Appendix A.

<sup>5</sup> The question of a waiver of Namibia's assessment was in fact submitted to the Finance Committee

On 14 November 1977 the F.A.O. Conference accepted the recommendation of the General Committee and admitted Namibia as a full Member of the Organization 'represented by the United Nations Council for Namibia'.<sup>1</sup> Namibia was then included in the 1978-9 Scale of Contributions at the minimum rate.

After the results of the voting had been announced, the delegate of the United States of America informed the Conference, in explanation of vote, that the United States voted against the admission of Namibia as represented by the U.N. Council for Namibia for constitutional reasons:

We take the view that a state or nation in the sense meant in Article II of the F.A.O. Constitution is a territory controlled by an internationally recognised government located in the territory that it controls or administers. We do not consider it wise for the future of this Organization or other Organizations in the United Nations System to take decisions that create confusion as to the meaning of the concept of state or nation as it relates to membership in United Nations Organizations.

For this reason, although the F.A.O.'s General Committee took pains to underline the exceptional legal nature of the application of Namibia as represented by the Council of Namibia by characterising it in this manner, we cannot agree with the decision taken in favour of its full membership. In our view it would have been a wiser course to accept the Council for Namibia as an associate member, a status in which it would have been equally able to pursue the basic purposes of the United Nations General Assembly resolution cited in its application. That purpose was to encourage specialised agencies to help meet the needs of the people of Namibia currently outside that territory. The United States supports that objective . . .<sup>2</sup>

All the other speakers, particularly the representatives of the regional groups, welcomed the admission of all the new Members, including Namibia.<sup>3</sup>

The proceedings in this case also call for some comments. First, it is interesting that, despite the existence of provisions under which non-independent territories, such as Namibia, could be admitted as Associate Members of the F.A.O., the Conference admitted Namibia as a full Member of the Organization on the recommendation of the General Committee. It is, however, a pity that the matter was examined by the Committee at a private sitting<sup>4</sup> and, as the proceedings of these sittings are not made public, it is not possible to see the arguments advanced in the

which pointed out constitutional difficulties in acceding to the request to waive Namibia's assessment: see F.A.O. Doc. CL/72/4, paragraph 3.47.

<sup>1</sup> The voting, by secret ballot, was 112 votes for, 4 votes against, and 11 abstentions. The required two-thirds majority was 78; see Doc. C.77/PV/4.

<sup>2</sup> Doc. C.77/PV/4, pp. 23-4.

<sup>3</sup> See *ibid.*, pp. 21-3, for statements by the delegates from Sierra Leone (African region), Philippines (Asia and Far East region), Portugal (European region), Hungary (European socialist countries), Cuba (Latin American region), Iraq (Near East group) and Fiji (South-west Pacific region). The delegate of the U.S.A., speaking on behalf of the North American region, also welcomed all the other new members.

<sup>4</sup> The General Committee can hold public meetings if it is so determined by the Conference: see Rule X, paragraph 1, of the Rules of Procedure of the Conference: *Basic Texts of the F.A.O.*



Committee in support of, and against, the admission. Indeed, if the delegate of the United States had not made a statement in plenary in explanation of vote, it would not have been possible to know the reasons why some States voted against the admission of Namibia. Secondly, it should be pointed out that, whereas in many international organizations full membership is reserved for States, in the F.A.O. such membership is open to 'any Nation'. The F.A.O. Constitution does not contain a definition of the term 'nation', and there is no indication either in the proceedings of the U.N. Conference on Food and Agriculture, May-June 1943,<sup>1</sup> or in the report to the Governments of the United Nations by the Interim Commission on Food and Agriculture, August 1944,<sup>2</sup> as to why the term 'nation' was preferred to 'State' for purposes of membership in the F.A.O. However, in a number of declarations and statements made by the Conference and the Interim Commission, reference was made to 'the Governments and Authorities here represented', and the obligations of 'each Member Government or Authority' in the new organization.<sup>3</sup> While these phrases may have been deliberately employed to ensure the non-exclusion from membership in the Organization of the non-independent territories which participated at the inaugural Food and Agriculture Conference in 1943, they appear to indicate also that it was not intended to reserve full membership in the Organization exclusively for States.

Interestingly, the distinction between the terms 'nation' and 'State' for purposes of membership in international organizations was the subject of some debate at the U.N. Conference on International Organization. During the discussions in Committee 1/2 concerning the criteria for original membership in the United Nations Organization, the delegate from the Philippines stated that his Government preferred the word 'nation' to 'State', as the latter would technically not allow the Philippines to become a Member at once.<sup>4</sup> When the Co-ordination Committee of the Conference was examining the difference between the words 'nations' and 'peoples' in Article 1, paragraph 2, of the Charter, the member from Chile objected to the use of the word 'nations' as being juridically incorrect

<sup>1</sup> *U.N. Conference on Food and Agriculture, Hot Springs, Virginia, 18 May-3 June 1943; Final Act and Section Reports* (U.S. Government Printing Office, Washington, 1943).

<sup>2</sup> See *First Report to the Governments of the United Nations by the Interim Commission on Food and Agriculture* (Washington, 1 August 1944).

<sup>3</sup> See *U.N. Conference on Food and Agriculture, Final Act and Section Reports*. In its First Report the Interim Commission stated that provision had been made for membership in the permanent organization in due course for 'Governments' not represented on the Commission: *First Report* (previous note), p. 6.

<sup>4</sup> *Summary Report of the fourth meeting of Committee 1/2* (U.N.C.I.O. Doc. 242, 1/2/11). The report of the Rapporteur of Committee 1/2 of 26 May 1945 contains the following statement on the discussions: 'It was pointed out to the Committee that Chapter III of the Dumbarton Oaks Proposals referred to membership of States. This reference, it is explained, might exclude from membership those nations participating in the Conference which had not yet achieved full statehood. The Committee felt that all nations participating in this Conference should be included as initial members of the Organization': *U.N.C.I.O. Documents*, vol. 7, p. 121. See also Kelsen, *The Law of the United Nations* (1950), p. 60.

because international relations are carried on between States, not between nations. The member from the United States of America stated that the word 'nations' had been used advisedly because it was a broader term. He pointed out that there would be some parties to the Charter, such as India, which would not be States in the strict sense of the word and that if the word 'State' alone were used it would be undesirably narrow.<sup>1</sup>

The distinction between the words 'nation' and 'State' in international relations has also been described by Professor J. L. Brierly:

A state should not be confused with the whole community of persons in its territory; it is only one among a multitude of other institutions . . . which a community establishes for securing different objects, though obviously it is one of tremendous importance; . . . Nor should a state be confused with a nation, although in modern times many states are organized on a national basis, and although also the terms are sometimes used interchangeably, as in the title 'United Nations' which is actually a league of states, and even in the term 'international law'; a single state, e.g. the Indian Republic, may include many nations, . . .<sup>2</sup>

It seems, therefore, that the term 'nation' may be wider than 'State' in the context in which these are normally employed in international relations; and that the admission of non-independent Namibia to full membership in the F.A.O. may be justified on the basis of the Constitution of the Organization, which reserves such membership for 'nations'.

##### 5. *Action in the International Labour Organization (I.L.O.)*

Admission to membership in the I.L.O. is governed by Article 1, paragraphs 2, 3 and 4, of its Constitution. According to Article 1, paragraph 2, the Members of the I.L.O. shall be:

- (a) States which were Members of the I.L.O. on 1 November 1945; and
- (b) such other States as may become Members of the Organization in pursuance of the provisions of paragraphs 3 and 4 of Article 1.

Paragraph 3 lays down the procedure under which original and subsequent Members of the United Nations may become Members of the I.L.O.<sup>3</sup> and paragraph 4 authorizes the General Conference of the I.L.O. to 'admit Members to the Organization by a vote concurred in by

<sup>1</sup> This statement was supported by the Member from Mexico: 22nd Meeting of Co-ordination Committee, 15 June 1945: *U.N.C.I.O. Documents*, vol. 17, pp. 141-2. See also Minutes of the 24th meeting of the Co-ordination Committee where the Member from the U.S.S.R. insisted on the retention of the word 'nations' in Article 1, paragraph 4, of the Charter because 'there are some nations whose independence has to be protected and which have not yet reached the status of a State . . .': *ibid.*, vol. 17, p. 164. See also Ruth B. Russell, *A History of the United Nations Charter* (1958), p. 928.

<sup>2</sup> Brierly, *The Law of Nations* (6th edn., 1963), pp. 126-7.

<sup>3</sup> According to paragraph 3, 'Any original Member of the United Nations and any state admitted to membership of the United Nations by a decision of the General Assembly in accordance with the provisions of the Charter may become a Member of the International Labour Organization by communicating to the Director-General of the International Labour Office its formal acceptance of the obligations of the Constitution of the International Labour Organization'.

two-thirds of the delegates attending the session, including two-thirds of the government delegates present and voting . . .'.<sup>1</sup>

During the 64th Session of the International Labour Conference (June 1978) the Head of the Delegation of the U.N. Council for Namibia sent a letter, dated 7 June, to the Director-General of the I.L.O. informing him that 'at its 255th meeting the United Nations Council for Namibia decided to apply for full membership for Namibia, represented by the United Nations Council for Namibia, in the International Labour Organization', and that the action had been taken pursuant to Resolution 32/9 of the General Assembly of the United Nations.<sup>2</sup>

The matter was first considered by the Selection Committee which, at the request of the employers' members, asked the Legal Adviser of the Conference for an Opinion on the possible admission of Namibia as a Member of the I.L.O. and information concerning the position in other organizations.

In a written Opinion,<sup>3</sup> the Legal Adviser examined the law and practice of the I.L.O. concerning admission to membership and made, *inter alia*, the following points: membership in the Organization 'is only open to States' and, although the I.L.O. Constitution does not contain a definition of the term 'State', it has been generally accepted that the best known formulation of the basic criteria for statehood is that laid down in Article 1 of the Montevideo Convention 1933 on the Rights and Duties of States;<sup>4</sup> the I.L.O. Constitution contains provisions regarding the rights and obligations of Members which appear to confirm the need to meet the generally accepted basic criteria of statehood in international law;<sup>5</sup> the practice of the Organization on admission to membership is supported, in particular, by the Advisory Opinion of the Permanent Court of International Justice on the *Free City of Danzig and the I.L.O.*<sup>6</sup> where the Court concluded that, because it was under the protection of the League of

<sup>1</sup> The International Labour Conference is made up of government, employers' and workers' delegates on a 2:1:1 ratio (Article 3, paragraph 1, of the I.L.O. Constitution). Thus a two-thirds majority of the delegates attending the Conference will include the votes of the employers' and workers' delegates. This explains the requirement in paragraph 4 of Article 1 that the decision of the Conference to admit a new Member shall be made by a vote concurred in by two-thirds of the delegates attending the session, 'including two-thirds of the Government delegates present and voting'.

<sup>2</sup> See above, pp. 190-1, for text of this resolution.

<sup>3</sup> I.L.O., 64th Session (Geneva, June 1978), *Provisional Record No. 24*, pp. 20-2.

<sup>4</sup> For the provisions of this article, see above, p. 194 n. 3.

<sup>5</sup> In this respect the Legal Adviser referred to the fact that delegates to the International Labour Conference are appointed by the 'Governments' of Members (Article 3, paragraph 1, of the I.L.O. Constitution); Members are under an obligation to bring a newly adopted I.L.O. Convention before their competent authorities for the 'enactment of legislation or other action' (Article 19); the government of a Member which is involved in a complaint under the I.L.O. Constitution may refer the complaint to the International Court of Justice (Article 29) where, according to Article 34 of the Statute of the Court, 'only States may be parties in cases before the Court'; and the obligation of each Member to grant privileges and immunities to the Organization 'in its Territory' (Article 40). The Legal Adviser pointed out that these provisions presuppose, *inter alia*, the possession by Members of the I.L.O. of a government, a legislature, *locus standi* before the I.C.J. and effective jurisdiction over their territories: *ibid.*, p. 21.

<sup>6</sup> *P.C.I.J.*, Series B, No. 18 (1930). See also *I.L.O. Official Bulletin*, vol. 15, no. 3 (1930), pp. 71-96.



Nations and Poland was responsible for the direction of its international relations, the Free City of Danzig could not participate as a Member in the work of the I.L.O., even though it had a defined territory and population, an independent legislative power and parliament, a government and a senate, as well as judicial courts made up of independent judges, and had its own flag, and issued passports to its nationals. On the basis of these analyses, the Legal Adviser concluded:

Namibia has not yet attained independent statehood. Namibia is still under the administration of the United Nations, and the conduct of the foreign relations of Namibia is entrusted to the United Nations Council for Namibia. It seems to me to follow from the present terms of the I.L.O. Constitution, from the meaning given to those terms in international law, from the practice of the I.L.O. and particularly from the Advisory Opinion of the Permanent Court of International Justice in the Free City of Danzig case, that Namibia cannot be admitted as a Member of the I.L.O. until it attains independence, and becomes able to exercise all the rights and discharge all the obligations of membership in the Organization.<sup>1</sup>

With regard to the question of the membership of the U.N. Council for Namibia, the Legal Adviser stated that the Council was created by a resolution of the General Assembly of the United Nations and that, since it remains a subsidiary organ of the United Nations, it would also seem to follow from the requirements of the Constitution that members be 'States' that 'the Council for Namibia cannot be admitted as a Member of the I.L.O.'<sup>2</sup>

After receiving the legal opinion, the Selection Committee referred the matter to a tripartite Subcommittee for examination.<sup>3</sup> The delegation of the U.N. Council for Namibia submitted to the Subcommittee a Memorandum<sup>4</sup> in which the following arguments were, *inter alia*, advanced in support of the membership of Namibia: the legal advice requested from the Legal Adviser was unnecessary since, on the question of admission of new Members, the I.L.O. must take into consideration and follow the decisions of the United Nations—recourse can be made to the I.L.O. Constitution and to the practice of the Organization only if the United Nations has not taken any decision concerning a particular country;<sup>5</sup> Namibia possessed all the attributes of statehood in international

<sup>1</sup> *Provisional Record No. 24* (above, p. 212 n. 3), p. 21.

<sup>2</sup> *Ibid.*, pp. 21–2. The Legal Adviser also stated in his Opinion, in compliance with the request of the Selection Committee, that Namibia has not yet been admitted as a Member of the United Nations, but has been admitted as a full Member in the F.A.O., and as an Associate Member in the W.H.O. and U.N.E.S.C.O.: *ibid.*, p. 22.

<sup>3</sup> The Subcommittee, which was composed of six government, three employers' and three workers' delegates, was appointed by the Selection Committee in accordance with the terms of Article 28, paragraph 3, of the Standing Orders of the Conference.

<sup>4</sup> The memorandum was entitled 'Working Paper No. 1': *Provisional Record No. 24* (above, p. 212 n. 3), pp. 23–4.

<sup>5</sup> *Ibid.*, p. 23. The delegation pointed out that the General Assembly had taken clear decisions with respect to Namibia, particularly in Resolution 32/E of 4 November 1977, and the F.A.O. had admitted Namibia as a full Member on the basis of that decision: *ibid.* It should be pointed out, however, that the decision of the F.A.O. Conference was based on General Assembly Resolution 31/149 of 20 December 1976 and not on Resolution 32/E, which was not brought to its attention (see above, p. 208).

law and would be able to enjoy all the rights and discharge all the obligations of a Member of the I.L.O.;<sup>1</sup> the Advisory Opinion of the Permanent Court of International Justice in the *Free City of Danzig* was not relevant, since the facts of that case were not the same as those of Namibia—the latter's application was not submitted by Poland which was responsible for its international relations,<sup>2</sup> while Namibia's application was submitted by the U.N. Council for Namibia which directs the international relations of the territory;<sup>3</sup> the U.N. Council for Namibia was not seeking to become a Member of the I.L.O., but had merely submitted the application for membership on behalf of Namibia.<sup>4</sup>

On the conclusion of its deliberations, the Subcommittee submitted to the Selection Committee a draft resolution, intended for adoption by the Conference, which contained, *inter alia*, the following provisions:<sup>5</sup>

Noting that Namibia is the only remaining case of a former mandate of the League of Nations where the former mandatory Power is still in occupation,

Considering that an application for membership in terms of article 1 is prevented only by the illegal occupation of Namibia by South Africa, the illegal nature of this occupation having been confirmed by the International Court of Justice in its Advisory Opinion of 21 June 1971,

Affirming that the International Labour Organization is not prepared to allow the legitimate rights of the Namibian people to be frustrated by the illegal actions of South Africa,

Making it clear that in now granting the application for membership it does not overlook the wording of article 1 and believes that in the near future the illegal occupation of Namibia by South Africa will be terminated;

Decides to admit Namibia to membership in the Organization, it being agreed that, until the present illegal occupation of Namibia is terminated, the United Nations Council for Namibia, established by the United Nations as the legal administering authority for Namibia empowered, *inter alia*, to represent it in

<sup>1</sup> *Provisional Record No. 24* (above, p. 212 n. 3), p. 23.

<sup>2</sup> It should be pointed out that the application of the Free City of Danzig for membership in the I.L.O. was in fact submitted to the I.L.O. by the Polish Government: see letters of 20 January 1930 and 27 March 1930 from the Polish Government Delegate to the Governing Body of the I.L.O.: *I.L.O. Official Bulletin*, vol. 16, no. 2 (30 June 1931), pp. 67 and 71 respectively.

<sup>3</sup> *Provisional Record No. 24* (above, p. 212 n. 3), p. 24. The delegation pointed out that even if the Advisory Opinion of the P.C.I.J. confirmed the practice of the I.L.O., such a practice could nevertheless be changed: 'A custom can always be changed': *ibid.*

<sup>4</sup> *Ibid.*, p. 24. The delegation stated also that Namibia had not been admitted as a Member of the United Nations because it would be illogical for a subsidiary organ, such as the U.N. Council for Namibia, to become a Member of the superior organ, and that in any case 'with regard to the degree of independence or the level of statehood' for purposes of membership 'the I.L.O. is much more flexible than the United Nations': *ibid.*, p. 24.

<sup>5</sup> The resolution also noted that the application submitted by the U.N. Council for Namibia had been supported by S.W.A.P.O.—'which had been recognized by the United Nations as the sole and authentic representative of the Namibian people'. It also noted that Article 1, paragraph 2, of the I.L.O. Constitution provides that the Members of the I.L.O. 'shall be the States which were Members of the Organization on 1 November 1945 and such other States as may become Members in pursuance of paragraphs 3 and 4 of the article': *ibid.*, p. 19.

international organizations, will be regarded as the Government of Namibia for the purpose of the application of the Constitution of the Organization.<sup>1</sup>

This resolution gave rise to controversy in the plenary of the Conference.<sup>2</sup> On the one hand, some delegates<sup>3</sup> maintained that Namibia could not be admitted as a Member of the I.L.O. for the following reasons:<sup>4</sup> the legal position as presented by the Legal Adviser of the I.L.O. represented a logical and reasonable approach to the application in relation to the constitutional requirements for membership in the I.L.O.; the fact that Namibia had been admitted as a full Member in one organization and as Associate Member in two others should not be regarded as justification for its admission in the I.L.O. which has a different structure from the other agencies; examination of the information made available to the Conference by the U.N. Council for Namibia on its structure showed that Namibia was not in a position to fulfil the obligations of membership in the I.L.O.—Namibia had no satisfactory administrative structure of the kind which normally pertains to an independent State and which could accommodate the full tripartite obligations of the I.L.O.; to admit Namibia at that stage of its existence would be premature and would create a dangerous precedent and give rise to difficult problems in the future—such a step might weaken the Organization in dealing effectively with future applications of a similar nature; and, in any case, the issue before the Conference was almost entirely political in nature and its solution should be found in accelerated action by the United Nations itself.<sup>5</sup>

On the other hand, the admission of Namibia was supported by many delegates<sup>6</sup> on the grounds, *inter alia*, that: since Namibia is the only remaining former mandate of the League of Nations, its case was unique and its admission to membership should be considered as a case *sui generis* and could not in any way constitute a precedent for any other set of circumstances in the future; the question of the admission of Namibia was a purely political issue and the Legal Officers of the I.L.O., who were charged with giving an opinion on the law and on the I.L.O. Constitution

<sup>1</sup> Ibid., pp. 19–20.

<sup>2</sup> After considering the report of the Subcommittee, the Selection Committee decided, with reservations from a number of government and employer members concerning the legal aspects of the matter, to submit the draft resolution to the Conference for adoption: *ibid.*, p. 19.

<sup>3</sup> These included the government delegates of the Federal Republic of Germany (who also spoke on behalf of the government delegates of Canada, France and the United Kingdom) and the Netherlands (who spoke also on behalf of the government delegates of Australia, Belgium, Luxembourg and Portugal) and the employers' delegates of Canada and Norway: see I.L.O., 64th Session (Geneva, June 1978), *Provisional Record No. 28*, pp. 4–5 and 7–8.

<sup>4</sup> These delegates emphasized, however, that they support the aspirations of the Namibian people for independence and condemn the illegal occupation of the Territory by South Africa: *ibid.*, pp. 4–5.

<sup>5</sup> See particularly the speech of Mr. Richan, the employers' delegate from Canada, explaining the position of a number of the employers' delegates: *ibid.*, pp. 4–5.

<sup>6</sup> The following delegates spoke in support of the admission: governments: Australia, Poland, Sweden, Ireland, Sudan, Italy, Tunisia, Yugoslavia, Mexico and Indonesia (who also spoke on behalf of Malaysia, Thailand and the Philippines); employers: Mr. Georget (Niger) and Mr. Nowak (Poland); workers: Mr. Ahmad (Pakistan), Mr. Hawke (Australia), Mr. Morris (Canada) and Mr. Ben-Israel (Israel): *ibid.*, pp. 1–8.



and Standing Orders as they saw them, had no responsibility to make a political judgment; the only reason Namibia was not in a position to present its application for membership in accordance with the constitutional provisions was because of the illegal occupation of that territory by the Government of South Africa—a fact that had been affirmed by the International Court of Justice in its Advisory Opinion in the *Namibia* case;<sup>1</sup> thus, while the I.L.O. Constitution must be respected, failure to admit Namibia as a Member in the existing circumstances would be to allow the illegal action of the Government of South Africa to frustrate the I.L.O. Constitution and the will of the Organization and that would be a strange way of respecting the I.L.O. Constitution.<sup>2</sup>

After the debate, the resolution concerning the admission of Namibia as a full Member of the I.L.O. was adopted, on a record vote, by 368 votes in favour, none against, and 50 abstentions—more than two-thirds of the delegates attending the session, including two-thirds of the Government delegates present and voting.<sup>3</sup>

The proceedings in this case raise some very interesting points. It was argued by the delegation of the U.N. Council for Namibia, and some delegates at the Conference, that the I.L.O. was bound by resolution 32/9<sup>E</sup> of the General Assembly of the United Nations. This raises a question concerning the extent to which international organizations, and particularly the specialized agencies, are bound by recommendations of the General Assembly. Obviously, this subject would require some detailed study, but, for present purposes, it may be sufficient to mention that the nature of action to be taken by the I.L.O. with respect to recommendations of the General Assembly and the Security Council is laid down in the Agreement between the United Nations and the Organization, which provides in Article 3 that the I.L.O. 'agrees to arrange for the submission, as soon as possible, to the Governing Body, the Conference or such other organ of the International Labour Organization as may be appropriate, of all formal recommendations which the General Assembly or the Council may make to it'.<sup>4</sup> Thus the obligation of the I.L.O. would appear to be limited to the submission of the recommendations to its main organs, but the latter are clearly not bound to accept them, although they would normally consider them in the light of the circumstances of their adoption

<sup>1</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, I.C.J. Reports, 1971, p. 16.

<sup>2</sup> See particularly the speech of Mr. Hawke, workers' delegate from Australia, who presented the draft resolution in the Subcommittee and who succeeded in mobilizing the support of all the workers' delegates at the Conference solidly behind the resolution calling for the admission of Namibia: *Provisional Record No. 28* (above, p. 215 n. 3), pp. 6-7.

<sup>3</sup> *Ibid.*, p. 9 and pp. 16-18.

<sup>4</sup> See *Agreements between the U.N. and the Specialized Agencies* (U.N., New York, 1952), pp. 4-5. The Agreements between the U.N. and the F.A.O., and the U.N. and the W.H.O., contain similar provisions in Articles IV respectively; see *ibid.*, pp. 16 (F.A.O.) and 59-60 (W.H.O.). See also *United Nations Treaty Series*, vol. 16, p. 325, for the Agreement with I.M.F.; *ibid.*, vol. 1, p. 207, for the Agreement with F.A.O.; and *ibid.*, vol. 19, p. 193, for the Agreement with W.H.O.

and the law and practice of the Organization and give effect to them to the extent possible under the I.L.O. Constitution.<sup>1</sup>

The resolution adopted by the Conference granting membership to Namibia contains some very interesting provisions. First, it regards the U.N. Council for Namibia as 'the Government of Namibia' for the purposes of the application of the Constitution of the I.L.O. Although this is the first time that the Council has been granted the status of a 'government', it should be explained that the provisions are a legal fiction designed to meet the legal difficulty in the I.L.O. Constitution whereby the rights and obligations of membership are to be enjoyed or discharged as the case may be, by the 'governments' of members. If the U.N. Council for Namibia had been referred to as the Legal Administering Authority for Namibia, it could lead to difficulties as to whether the rights and obligations of membership are opposable to it.

Secondly, the resolution, after noting that it was the illegal occupation of Namibia by South Africa that prevented the submission of Namibia's application in accordance with the provisions of the I.L.O. Constitution, stipulates that: 'The International Labour Organization is not prepared to allow the legitimate rights of the Namibian people to be frustrated by the illegal occupation of South Africa.'<sup>2</sup> Here then lies the justification, the *raison d'être*, for the admission of Namibia as a Member of the I.L.O. By regarding the rights of the Namibian people as subsisting irrespective of the illegal occupation of their territory by South Africa, and by refusing to recognize the illegal acts committed by South Africa or to allow that country to benefit from such acts,<sup>3</sup> the Conference appears to have resorted to the principle *ex injuria jus non oritur* according to which 'an illegality cannot, as a rule, become a source of legal right to the wrongdoer'.<sup>4</sup>

However, the application of this principle in the present case may not be free from difficulties<sup>5</sup>—the question may be raised whether the admission

<sup>1</sup> In actual practice, when a recommendation is not in conflict with the I.L.O. Constitution, the main organs have always accepted it: see, for instance, the case of the admission of China, discussed by the present writer, 'Ultra Vires Acts in International Organizations—The Experience of the International Labour Organization', this *Year Book*, 48 (1976-7), at pp. 262-4.

<sup>2</sup> See above, p. 214.

<sup>3</sup> During the debates in the plenary of the International Labour Conference, some delegates emphasized that South Africa will benefit directly from the non-admission of Namibia; see, for instance, the statement by Mr. Franic, government delegate, Yugoslavia: *Provisional Record No. 28* (above, p. 215 n. 3), p. 6.

<sup>4</sup> H. Lauterpacht, *Recognition in International Law* (1947) (henceforth referred to as Lauterpacht, *Recognition*), p. 420. It should be mentioned, however, that the principle *ex injuria jus non oritur* should not be seen purely from the point of view of denial of legal rights to the wrongdoer; rather, as Professor R. Y. Jennings has pointed out: 'This maxim—a general principle of law—serves to bring together under one rubric all those cases where the ground of possible nullity is a legal wrong; and in regard to these cases the normal rule must be this: that the law will always lean towards the principle that a wrongful act must be ineffective to change or create legal rights': Jennings, 'Nullity and Effectiveness in International Law', *Cambridge Essays in International Law—Essays in Honour of Lord McNair* (1965), p. 72 (to be referred to henceforth as Jennings, 'Nullity and Effectiveness').

<sup>5</sup> The operation of the principle *ex injuria jus non oritur* in international law has given rise to

of Namibia to full membership in international organizations does, in fact, constitute the denial of a legal right to South Africa which, by illegally occupying the Territory by force, is obviously the wrongdoer; or whether South Africa would benefit in any way from the non-admission of Namibia to membership in international organizations. These questions can be answered in the affirmative. Since South Africa continues to claim legal authority over Namibia, the admission of the latter as a full Member in international organizations, to be represented by the U.N. Council for Namibia, does indeed amount to the denial of the legal rights asserted over the Territory by South Africa. Similarly, in so far as non-recognition may be seen as an implied recognition<sup>1</sup> of the illegal occupation of the Territory by South Africa, the admission of Namibia to membership in international organizations means that South Africa has not been allowed to benefit from its illegal acts.

It should be added that in international law and organization, where there is virtually no compulsory jurisdiction for the enforcement of legal wrongs or breaches of the law, non-recognition of illegal acts plays a vital role in the maintenance of the law. As has been pointed out by Sir Hersch Lauterpacht:

The principle of non-recognition fulfils in the present stage of international organization an important function in the maintenance of the authority of the law. From the jurisprudential point of view the acceptance of the policy or of the obligation of non-recognition amounts to a vindication of the legal character of international law as against the 'law creating effects of facts'. In a society in which the enforcement of the law is precarious, there is a natural tendency to regard successful breaches of the law as a source of legal right. Non-recognition obviates that danger to a large extent. It is the minimum of resistance which an insufficiently organised but law-abiding community offers to illegality; it is a continuous challenge to a legal wrong. In a sense, the effectiveness of non-recognition grows with the passage of years. For it brings into relief the contrast between the consolidating power of the successful defiance of the law and its status as a legal nullity. As such it adds substantial emphasis to the legal character of international law.<sup>2</sup>

difficulties. Sir Hersch Lauterpacht has remarked that the principle had been 'exposed to considerable strain and wide exceptions' (*Recognition*, p. 421), and Professor Ian Brownlie has warned that reference to the principle 'does not provide a safe guide to the solution of specific problems': *Principles*, p. 512.

<sup>1</sup> On the effects of the recognition of illegal acts in international law, see Lauterpacht, *Recognition*, pp. 429-30; and Jennings, 'Nullity and Effectiveness', pp. 74-8.

<sup>2</sup> Lauterpacht, *Recognition*, pp. 430-1. It should be mentioned that the non-recognition of illegal acts has been seen by some writers as constituting a sanction against the wrongdoer. Krystyna Marek has this to say on the subject: 'As a sanction of the illegal act, it penalizes the law-breaker by denying to him the intended result of his law-breaking, namely, the validity of the situation brought about by him in an unlawful manner. This is the aspect of the sanction *sensu stricto*, i.e. an act directed against, and affecting, the illegal act and its author. But the act of non-recognition also has another aspect concerning the victim of the illegal act, whose full and unimpaired rights are reserved': Marek, *Identity and Continuity of States in Public International Law* (Thèse No. 98, présentée à l'Université de Genève, 1954), pp. 560-1. Professor Paul Guggenheim has also stated: 'La nullité de certains actes illicites, le droit de leur refuser la reconnaissance, reposent sur l'idée que la violation de la règle de droit



While there may still be some controversy concerning certain aspects of the principle of non-recognition of illegal acts in international law, the foregoing statement, made over thirty years ago, remains substantially valid today, and has taken added significance with respect to the developing law of international organizations.

## V. SOME LEGAL QUESTIONS ARISING FROM THE CASE OF NAMIBIA

The admission of Namibia, and the U.N. Council for Namibia, to membership in some international organizations and conferences would appear to raise a number of legal questions all of which cannot be properly dealt with in the present study. It would seem appropriate, however, to consider some of these questions.

### 1. *The legal effects of the membership of the U.N. Council for Namibia in international bodies*

So far as the U.N. Council for Namibia is concerned, the main question that arises is whether its admission to membership in international bodies is compatible with its status as an organ of the United Nations and/or the Legal Administering Authority for Namibia. However, since the Council has not been admitted as a Member of any international organization—in both the F.A.O. and the I.L.O. it was Namibia that was granted full membership, to be represented by the Council—and the rights granted to it at the United Nations Conference on the Succession of States in Respect of Treaties and the Third United Nations Conference on the Law of the Sea were not substantially different from those of ‘Observers’,<sup>1</sup> it would appear that the nature of its participation so far in international organizations and conferences is not incompatible with its status either as an organ of the United Nations or as the Legal Administering Authority for Namibia.

But as international conferences were requested in the relevant resolutions of the General Assembly of the United Nations to grant ‘full membership’ in their proceedings to the U.N. Council for Namibia, the latter’s admission to the above conferences without full rights may justify the presumption that, irrespective of the extent of their legal personality, the international community is not yet prepared to grant full membership

international peut, indépendamment de la sanction qu’elle comporte en vertu des principes relatifs à la responsabilité internationale, avoir la conséquence de ne pas pouvoir créer une situation juridique valable. L’acte illicite est—du moins dans une certaine mesure—assimilé à l’acte nul, conformément à l’adage déjà mentionné: *ex iniuria ius non oritur*: Guggenheim, ‘La Validité et la nullité des actes juridiques internationaux’, *Recueil des cours*, 74 (1949-I), p. 226. For criticisms of the tendency to regard non-recognition of illegal acts as a sanction, see Moore, *Harvard Law Review*, 50 (1937), p. 436. See also the comments of Sir Hersch Lauterpacht on the subject: Lauterpacht, *Recognition*, pp. 434–5.

<sup>1</sup> See above, pp. 203–5; see also E. Suy, ‘The Status of Observers in International Organizations’, *Recueil des cours*, 160 (1978-II), pp. 79–179.

to international bodies in comprehensive international organizations and conferences. Nor is there a pressing necessity that these entities should be admitted as full members. What is required is that they should be granted such participation as would enable them to discharge their mandates and fulfil their objects and purposes, and there can be no doubt that participation as 'Observers' with, in certain special circumstances, the right to make statements and submit proposals during the proceedings is sufficient in that respect.<sup>1</sup> In fact, since international bodies and organs are composed of many member States with varying interests and ideologies, the grant to them of voting rights in the proceedings of other international organizations could lead to difficulties as to how such votes should be cast on matters in which the interests of the member States are in conflict.

## *2. The legality of the admission of Namibia to membership in international organizations*

During the proceedings in both the F.A.O. and the I.L.O. concerning the application of Namibia for membership, some delegates expressed concern as to the propriety of the admission under the Constitutions of these Organizations.<sup>2</sup> This raises a question whether the admission is illegal or void. As the admission of Namibia can be justified under the relevant provisions of the F.A.O. Constitution,<sup>3</sup> the question of legality or nullity is relevant only with respect to the I.L.O. where full membership is reserved for 'States', and the practice of the Organization clearly shows that only sovereign and independent States are admitted as new Members.

In considering this question, it should be recalled that in the I.L.O., as in many international organizations, the Constitution does not contain a definition of the term 'State' for purposes of membership. As such, it is for the organ within whose competence the matter lies to determine in each case whether an entity applying for admission is a 'State'. But as the Constitutions of international organizations are multilateral treaties, the competent organ, in making the determination, should have regard to the meaning of the term 'State' in international law and organization.

Since it is a generally accepted principle that independence is an indispensable element in the notion of statehood for purposes of international law and relations, including membership of international organizations, the admission of non-independent Namibia as a full Member in international organizations where such membership is

<sup>1</sup> Indeed, during its 33rd Ordinary Session in Monrovia, Liberia (6-16 July 1979), the Council of Ministers of the Organization of African Unity granted to the U.N. Council for Namibia only the status of a permanent Observer: Res. CM/Plen./Dft. Res. 11 (XXXIII). This clearly shows that the Council of Ministers considers that participation as 'Observer' is sufficient to enable the U.N. Council for Namibia to fulfil its mandate.

<sup>2</sup> See above, pp. 209 and 215. See also the statement of Mr. Haase, government delegate of the Federal Republic of Germany, during the proceedings at the 64th Session of the International Labour Conference, 1978, on behalf of the Government delegates of Canada, the Federal Republic of Germany, France and the United Kingdom: *Provisional Record No. 28* (above, p. 215 n. 3), p. 4.

<sup>3</sup> See above, p. 211.

reserved for States would not appear to be compatible with the Constitutions of the Organizations concerned. This does not mean, however, that the admission is ineffective or void for, as has been pointed out elsewhere,<sup>1</sup> decisions of the plenary organs of international organizations, which are not subject to appeal or review by a superior body, give rise to binding obligations even if they are incompatible with the express provisions of the Constitution or other relevant law. Decisions concerning the admission of new Members in international organizations fall within this category. Indeed, Namibia, in the exercise of its constitutional rights as a full Member of the I.L.O., designated government, employers' and workers' delegates to the 65th Session of the International Labour Conference in June 1979—one year after its controversial admission—and the credentials of the delegates were not challenged or questioned by any delegate at the Conference.<sup>2</sup>

The effectiveness of decisions of international organizations in these circumstances should not be regarded as extraordinary, for in international law generally there are certain wrongful acts, such as the premature recognition of a new State, or the waging of aggressive war, 'in which the idea of nullity is completely ousted and the legal effectiveness of the wrongful act is accepted without any subtraction'.<sup>3</sup> Furthermore, in considering the place of nullity with respect to the acts of international organizations, it may be useful to bear in mind the pertinent remarks of Professor R. Y. Jennings:

And it is important also to realise that notions of *ultra vires* and notions of nullity and invalidity must be carefully circumscribed in relation to decisions that are in essence exercises of political judgment related to the circumstances of the moment. This is not to suggest that they have no place, but it is to suggest that their unrestrained and strictly logical and legalistic application in this sphere could spell the defeat of even tentative probes towards world government.<sup>4</sup>

Before leaving the question of the legal validity of the admission of Namibia, it should perhaps be mentioned that differences of opinion or disagreement among Members of an international organization as to whether an entity is a 'State' or 'Nation' for purposes of membership would constitute a 'question' or 'dispute' relating to the interpretation of the Constitution of the organization concerned, and the International

<sup>1</sup> See the present writer, '*Ultra Vires* Acts in International Organizations—The Experience of the I.L.O.', this *Year Book*, 48 (1976-7), pp. 259-80, especially at pp. 278-9; also 'Unconstitutional Acts in International Organizations: The Law and Practice of the I.C.A.O.', *International and Comparative Law Quarterly*, 28 (1979), pp. 1-26, especially at pp. 22-4. On the general question of illegality and nullity with respect to the acts of international organizations, see also Jennings, 'Nullity and Effectiveness'; E. Lauterpacht, 'The Legal Effect of Illegal Acts of International Organizations', *Cambridge Essays in International Law—Essays in Honour of Lord McNair* (1965), pp. 88-121; and Felice Morgenstern, 'Legality in International Organizations', this *Year Book*, 48 (1976-7), pp. 241-57.

<sup>2</sup> Namibia was represented by the following delegates: government—Messrs. M'hamed Achache and Samba Mbodj; employers—Mr. Nahas Angula; and workers—Mr. John Ya-Otto; see I.L.O., 65th Session (June 1979), *Supplement to Provisional Record* (21 June 1979), Delegations, p. 63.

<sup>3</sup> Jennings, 'Nullity and Effectiveness', p. 73.

<sup>4</sup> *Ibid.*, p. 86.



Court of Justice has jurisdiction under the various Constitutions to determine the matter.<sup>1</sup> The question or dispute could be referred to the Court in the form of a request for an Advisory Opinion—in which case its Opinion would not normally be binding—or as a contentious issue by the Members in conformity with the Statute of the Court.<sup>2</sup> In either of these cases, if the Court finds that the entity concerned is not a 'State', its finding will have a strong bearing, or even persuasive effect, on the outcome of the subsequent proceedings. However, a proposal to refer the matter to the Court may not be free from difficulties. First, since the decisions of the plenary organs of international organizations on admission are not subject to appeal or review, a motion to submit the matter to the International Court of Justice will have to be made during the proceedings for admission and, if accepted, the proceedings will be suspended until the matter has been determined by the Court. This will no doubt give rise to some delay in deciding on the application for membership. Secondly, if the matter is or becomes a highly political issue, it may not be possible to obtain the necessary consensus to submit the case to the International Court of Justice, particularly if a majority of the Members are in favour of granting admission.

### 3. *The effect of Namibia's admission on the concept of 'State' for purposes of membership in international organizations*

Given that the admission of Namibia is not void, the further question arises whether there has been a new interpretation of the basic constitutional documents resulting in a change in the concept of 'State' for purposes of membership in international organizations. Again, this question is only relevant with respect to those international organizations, such as the I.L.O., where full membership is reserved for 'States'. The proceedings in the I.L.O. may throw some light on the matter.

During the debates at the plenary meeting of the International Labour Conference, some of the delegates who supported Namibia's application emphasized that its admission would not constitute a precedent for the future. According to Mr. Hawke, the workers' delegate of Australia:

In the resolution that we put to you and asked for your overwhelming support, we make it quite clear—we spell it out—that the decision that has been taken and which you are asked to take here is unique . . . I stress that, should there still be any delegates who are legitimately concerned that in passing this resolution we may be creating some precedent for the future, they should have confidence in the fact that the resolution itself quite clearly and specifically spells out why this resolution is absolutely and totally unique and cannot in any way constitute a precedent for any other set of circumstances in the future.<sup>3</sup>

<sup>1</sup> See, for instance, Article 37 of the I.L.O. Constitution; Article 75 of the W.H.O. Constitution; and Article XVII of the F.A.O. Constitution.

<sup>2</sup> The decision of the Court in these circumstances would give rise to binding obligations only for the Members that were parties to the case before the Court.

<sup>3</sup> *Provisional Record No. 28* (above, p. 215 n. 3), p. 7. See also the statements made by the government delegate of Sweden on behalf of the governments of Denmark, Finland, Iceland, Norway and Sweden (*ibid.*, p. 4), and the government adviser of Ireland (*ibid.*, p. 5).

Apart from the statements made by delegates, it seems evident from the resolution granting membership to Namibia that the International Labour Conference did not intend to depart from the provisions of the I.L.O. Constitution concerning admission of new Members or from the meaning attributed to those provisions in the past. Thus, after 'Considering' that the application for membership in terms of Article 1 of the I.L.O. Constitution was prevented only by the illegal occupation of Namibia by South Africa, the Conference made it clear 'that in now granting the application for membership it does not overlook the wording of Article 1 and believes that in the near future the illegal occupation of Namibia by South Africa will be terminated'.<sup>1</sup>

These proceedings leave little doubt that there has been no new interpretation of the I.L.O. Constitution resulting in a change in the meaning generally attributed to the term 'State' for purposes of membership in the Organization. Indeed, it seems apparent from the statements made by many delegates that the admission of Namibia was based on political expediency,<sup>2</sup> rather than on a desire to adopt a new interpretation of the Constitution.

#### 4. *The effect of admission on the legal status of Namibia—the question of implied recognition*

There has been controversy among international lawyers as to whether admission to membership in international organizations constitutes the collective recognition of the entity as a 'State'. On the one hand, there are those, such as Professor Ian Brownlie, who consider that admission to membership in international organizations like the League of Nations and the United Nations is '*prima facie* evidence of statehood'.<sup>3</sup> On the other hand, some writers, among them Hans Aufricht, feel that such an

<sup>1</sup> *Provisional Record No. 24* (above, p. 212 n. 3), p. 19.

<sup>2</sup> In the words of Mr. Fogarty, government delegate, Australia: 'An over-riding consideration which has clearly been shared by a majority of the Organization's membership is the main political purpose of the resolution and the important and added encouragement it will give to the Namibian people as they progress towards independence in a free and united country': *Provisional Record No. 28* (above, p. 215 n. 3), p. 2. According to Mr. Navarrete, government delegate, Mexico, the admission of Namibia 'meets an indisputable political need': *ibid.*, p. 7.

<sup>3</sup> According to Brownlie: 'The functioning of international organisations of the type of the League of Nations and United Nations provides a variety of occasions for recognition, of one sort or another, of states. Recognition by individual members of other members, or of non-members, may occur in the course of voting on admission to membership and consideration of complaints involving threats to or breaches of the peace. Indeed, it has been argued that admission to the League and the United Nations entailed recognition by operation of law by all other members, whether or not they voted against admission. The position, supported by principle and state practice, would seem to be as follows. Admission to membership is *prima facie* evidence of statehood, and non-recognizing members are at risk if they ignore the basic rights of existence of another state the object of their non-recognition': *Principles*, p. 99; see also Hans Kelsen, *The Law of the United Nations* (1950), p. 79; and Quincy Wright, 'Some Thoughts about Recognition', *American Journal of International Law*, 44 (1950), pp. 549–58, where he stated that '... the United Nations, by admitting an entity to its membership, can be properly said to "recognize" that entity as a state, and if it admits an individual appointed by a government as a representative of a state, it can properly be said to "recognize" the appointing government as the government of that state' (at p. 550).

admission does not imply collective recognition, 'except for the purpose of membership in the Organization' concerned.<sup>1</sup>

The admission of non-independent Namibia as a full member in the F.A.O. and the I.L.O. would appear to have added a new dimension and impetus to the controversy on this matter, and a brief examination of the effect of the admission on the legal status of Namibia would seem necessary. The main question which arises is whether, as a result of its admission, Namibia has been collectively recognized as a 'State' by the members of the F.A.O. and the I.L.O.

There is no doubt that Namibia can now be represented in the main organs of these organizations, and that all the rights and obligations of full membership are opposable to it. But because of its lack of sovereignty and independence, it may not be able to exercise all these rights. An interesting example is the right to submit a case to the International Court of Justice. According to Article XVII of the F.A.O. Constitution, 'any question or dispute concerning the interpretation of this Constitution, if not settled by the Conference, shall be referred to the International Court of Justice in conformity with the Statute of the Court or to such other body as the Conference may determine'. Article 34 (1) of the Statute of the Court provides that 'only States may be parties in cases before the Court', and Article 35 (1) that 'the Court shall be open to the States parties to the present Statute'.

Since Namibia is not yet a party to the Statute of the Court—and may presumably not be able to become a party until it attains independence or becomes a Member of the United Nations<sup>2</sup>—it may not be able to exercise the right of membership embodied in Article XVII of the F.A.O. Constitution in cases where a question or dispute is not settled by the Conference, and the latter does not decide to submit the matter to any other body. Similar considerations would seem to apply as regards Article 37 of the I.L.O. Constitution, which stipulates, *inter alia*, that a question or dispute relating to the interpretation of the Constitution 'shall be referred for decision to the International Court of Justice'.<sup>3</sup>

<sup>1</sup> In the opinion of Hans Aufricht, 'Admission to membership does not imply collective recognition by the United Nations individually. At the San Francisco Conference in 1945, the Norwegian Delegation proposed an amendment which was designed to give the new Organization the power of recommending collective recognition and collective withdrawal of recognition of new states and governments. Since this amendment was not adopted, it can be inferred that it was the intention of the authors of the Charter not to interpret admission to membership as equivalent to collective recognition of states or governments, except for the purpose of membership in the Organization': Aufricht, 'Principles and Practices of Recognition by International Organizations', *American Journal of International Law*, 43 (1949), p. 691. Professor D. P. O'Connell also stated that 'There is something illogical in the idea that governments can refuse to recognize each other and yet sit down together at the same table as members of an international organization, yet such indeed is the case': *International Law*, vol. 1, p. 155; see also Lauterpacht, *Recognition*, pp. 400-3; Higgins, *Development*, pp. 131-2; G. Schwarzenberger, *International Law as applied by International Courts and Tribunals*, vol. 3—*International Constitutional Law* (1976), pp. 265-8; and O. Schachter, this *Year Book*, 25 (1948), pp. 91-132, at pp. 113-15.

<sup>2</sup> According to Article 93 of the Charter of the United Nations, all Members of the Organization 'are *ipso facto* parties to the Statute of the International Court of Justice'.

<sup>3</sup> See also Article 29 (1) of the I.L.O. Constitution which grants the right to a Member to refer



Again, under their respective Constitutions, the F.A.O. and the I.L.O. are to enjoy in the territory of their Members such privileges and immunities as are necessary for the fulfilment of their purposes.<sup>1</sup> It is obvious that Namibia will not be able to discharge this obligation at the present time, although it could well be argued that its inability to do so is due more to the illegal occupation of the Territory by South Africa than to Namibia's lack of sovereignty and independence.

With respect to the effects of its admission outside the F.A.O. and the I.L.O., Namibia, as a Member of these specialized agencies, will now be able to accede to treaties such as the Vienna Convention on the Law of Treaties 1969; the Vienna Convention on Diplomatic Relations 1961; and the Geneva Conventions on the Law of the Sea 1958.<sup>2</sup> But it has no automatic right to membership in other international organizations, or to become a party to the Statute of the International Court of Justice.

The picture which thus emerges is that the admission of Namibia to membership in the F.A.O. and I.L.O. does, in fact, confer upon it a new status which enables it to participate on an equal footing in these organizations with sovereign and independent States, and to enjoy certain rights, such as accession to some treaties, outside the organizations. However, the Members of the organizations do not appear to be under any legal obligation under the respective Constitutions to regard Namibia as a 'State' for purposes outside the Organization, or to enter into bilateral relations with it. Indeed, since these questions were not considered during the proceedings relating to the admission of Namibia, and none of the Members has subsequently indicated that it considers Namibia to possess the character of a 'State' as a result of its admission to membership, it cannot be presumed that the act of admission constitutes the recognition of Namibia as a 'State' in international law. In fact, the question of Namibia's recognition in this respect may not arise until it attains independence.

If this situation is viewed against the background of the controversy on the matter, it will be seen that admission to membership in the United Nations—which confers upon the Member the additional right of

a complaint in which it is involved to the International Court of Justice. On the general implications of these provisions as well as those of Article 37 of the I.L.O. Constitution, see the present writer, 'The Exercise of the Judicial Function with respect to the I.L.O.', this *Year Book*, 47 (1974-5), pp. 315-40, especially at pp. 316-19, and 337-8.

<sup>1</sup> See Article XVI (2) of the F.A.O. Constitution and Article 40 (1) of the I.L.O. Constitution.

<sup>2</sup> These Conventions are open to accession by all *States Members* of the United Nations or of any of the specialized agencies or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly to become a party: see, respectively, Articles 83 and 81 of the Vienna Convention on the Law of Treaties; Articles 50 and 48 of the Vienna Convention on Diplomatic Relations; and Articles 33 and 31 of the Geneva Convention on the High Seas. It may be asked whether Namibia is a 'State Member' of the F.A.O. and the I.L.O. for the purpose of accession to these Conventions. However, since no distinction is drawn in these agencies with respect to the legal character of full Members, the question may be given a positive answer.

automatic membership in some specialized agencies,<sup>1</sup> and to become a party to the Statute of the International Court of Justice<sup>2</sup>—could constitute *prima facie* evidence of statehood; but only for the purpose of the enjoyment of the rights and the discharge of the obligations resulting from membership in the Organization. It follows, therefore, that unless it was made clear during the admission proceedings, Members of an international organization cannot be presumed to have recognized an entity as a 'State' for purposes unconnected with the Organization.

It should indeed be mentioned that the concept of 'recognition' does not appear to be entirely in conformity with the present law and practice of international organizations. While it is true that some of the organs are required, under the various Constitutions, to make decisions which could involve a determination of the character of an entity as 'State' for certain purposes, such as membership and the settlement of disputes,<sup>3</sup> or as 'government' for the purpose of the representation of a Member, it is nowhere stated in these instruments that admission implies, or is tantamount to, the collective recognition of the entity as 'State'. Furthermore, unlike recognition, which is a discretionary and unilateral act in international law,<sup>4</sup> admission to membership in an international organization is an act undertaken collectively by the Members in accordance with prescribed rules and procedures and, very often, entities have been admitted even though they have not been voted for or recognized by some or all of the Members of the Organization.<sup>5</sup> Thus, despite the persuasive

<sup>1</sup> The Constitutions of some of the specialized agencies grant to Members of the United Nations an automatic right to membership in the agencies; see, for instance, Article 1 (3) of the I.L.O. Constitution; Article 4 of the W.H.O. Constitution; and Article 92 of the Convention on International Civil Aviation.

<sup>2</sup> See Article 93 of the Charter of the United Nations, above p. 224 n. 2.

<sup>3</sup> On this aspect of the determination of statehood by the United Nations, see S. Rosenne, 'Recognition of States by the United Nations', this *Year Book*, 26 (1949), pp. 437-47.

<sup>4</sup> The Confidential Memorandum prepared by the U.N. Secretariat in 1950 concerning the problem of the recognition of China (quoted by Quincy Wright in *American Journal of International Law*, 44 (1950), p. 548) contained the following statement on the nature of recognition in international law: 'The recognition of a new State, or of a new government of an existing State, is a unilateral act which the recognizing government can grant or withhold.' The general attitude of States on the matter is clearly reflected in the following statement of the American representative in the U.N. Security Council, Mr. Austin, in reply to criticisms of the hasty recognition of the provisional Government of Israel by the United States: 'I should regard it as highly improper for me to admit that any country on earth can question the sovereignty of the United States of America in the exercise of that high political act of recognition of the *de facto* status of a state. Moreover, I would not admit here, by implication or by direct answer, that there exists a tribunal of justice or of any other kind, anywhere, that can pass upon the legality or the validity of that act of my country': *Security Council Official Records*, Third Year, 294th Meeting (1948), p. 16. On recognition generally, see Lauterpacht, *Recognition*; Oppenheim, *International Law*, vol. 1 (8th edn., 1955), pp. 124-52; Brownlie, *Principles*, pp. 89-108; Brierly, *The Law of Nations* (6th edn., 1963), pp. 137-50; O'Connell, *International Law* (2nd edn., 1970), vol. 1, pp. 166-92, and vol. 2, pp. 662-3. See also David Ijalaye, 'Was Biafra at Any Time a State in International Law?', *American Journal of International Law*, 65 (1971), pp. 551-9; and Philip Marshall Brown, 'The Legal Effects of Recognition', *ibid.*, 44 (1950), pp. 617-40.

<sup>5</sup> The fact that a Member of the United Nations has an automatic right to membership in some of the specialized agencies means that the members of these bodies do not have the opportunity to vote on the admission of some entities to membership in the organization. This is particularly true with

arguments that have been put forward by some prominent jurists to the contrary,<sup>1</sup> it is submitted, with respect, that there is no basis either in the Constitutions of international organizations, or in their practice, to justify the presumption that admission to membership in an international organization constitutes an implied recognition of the entity as 'State' by the Members of the Organization.<sup>2</sup>

## VI. GENERAL CONCLUSIONS

It may be useful to summarize, by way of general conclusions, some of the points which seem to emerge from the present study.

1. In most international organizations full membership is normally accorded to 'States', 'nations' or 'countries', but in international organizations such as the U.P.U., I.T.U. and W.M.O., non-autonomous territories may be admitted as full Members. The Constitutions of a number of international organizations (W.H.O., F.A.O., U.N.E.S.C.O., I.T.U. and I.M.C.O.) contain provisions under which non-independent territories can be admitted as Associate Members. Entities which are not States, including international organizations and organs, and national liberation movements, may be admitted as Observers, without the right to vote, into the proceedings of international organizations.

2. While the Constitutions of some international organizations—particularly the regional ones—stipulate that only sovereign and independent States should be admitted as full Members, there is no indication in the Constitutions of many of the international organizations which reserve full membership for 'States', 'nations' and 'countries' as to what constitutes these criteria. In practice, however, these organizations have insisted that the entities applying for admission as full Members should be sovereign and independent States.

3. In most international conferences, only States are invited to participate as full Members. Non-State entities, such as the United Nations organs, the specialized agencies and national liberation movements, are normally allowed to participate in the proceedings as 'Observers', without the right to vote.

4. The U.N. Council for Namibia was created to administer the Territory of Namibia on behalf of the United Nations until independence. In the exercise of its functions and powers, the Council acts both as an organ of the United Nations, and as the legal Administering Authority for

respect to the Members of the agencies which are not Members of the United Nations or, in the case of the I.L.O., the employers' and workers' delegates who normally participate in the votes in the organization.

<sup>1</sup> See, for instance, Quincy Wright in *American Journal of International Law*, 44 (1950), pp. 548-59.

<sup>2</sup> Cf. the U.N. Secretariat Memorandum referred to above which stated, *inter alia*, 'The fact remains, however, that . . . the United Nations does not possess any authority to recognize either a new State or a new government of an existing State. To establish the rule of collective recognition by the United Nations, would require either an amendment of the Charter or a treaty to which all Members would adhere': *American Journal of International Law*, 44 (1950), p. 548.



Namibia, but it remains responsible to the General Assembly of the United Nations in the over-all exercise of its functions and powers. The U.N. Council for Namibia operates on the international plane, but does not possess the status of a 'State', 'nation', 'country' or 'non-autonomous territory', one or the other of which constitutes the basic criterion for admission to full membership in most international organizations and conferences. However, the U.N. Council for Namibia may be represented by Observers, without the right to vote, in the proceedings of these bodies.

5. In compliance with the request addressed to international organizations and conferences in various resolutions of the General Assembly of the United Nations, the U.N. Council for Namibia was granted a special status, but without the right to vote, in various conferences, including the Vienna Conference on the Succession of States in respect of Treaties, and the Third United Nations Conference on the Law of the Sea. The nature of the participation granted to the Council in these conferences does not appear to be incompatible with its status as an organ of the United Nations, or as the legal Administering Authority for Namibia.

6. Namibia is not yet an independent Territory. As such, its non-independent status may militate against its admission as a full Member in the international organizations where such membership is reserved for 'States', 'nations' or 'countries'. However, in accordance with the request embodied in a number of resolutions of the General Assembly of the United Nations, Namibia has been admitted as a full Member in the F.A.O. and the I.L.O.

7. The membership of Namibia in the F.A.O. may be justified on the basis of the Constitution of the Organization, which reserves full membership for 'nations'; but in the I.L.O., where only 'States' may be admitted as full Members, the admission of Namibia would not appear to be compatible with the provisions of the Constitution. But as the decisions of the Conference on admission are not subject to appeal nor to review by a superior organ, the admission of Namibia is nevertheless effective, and could in any case be justified on the basis of the principle *ex injuria jus non oritur*.

8. The admission of non-independent Namibia as a full Member in the I.L.O. does not appear to have resulted in a new interpretation of the I.L.O. Constitution, or in a change in the meaning generally attributed to the term 'State' for purposes of membership in the Organization. In fact, the admission would appear to have been based on political expediency.

9. The admission of Namibia as a full Member in international organizations confers upon it a new status which enables it to interact on an equal footing with sovereign and independent States within the organizations concerned, but the admission does not constitute the collective recognition of Namibia as a 'State' in international law by the Members.

Finally, it should be added that a significant feature of the proceedings

in international organizations on admission to membership is the interplay between law and politics. While some jurists consider this situation to be inevitable, it has given rise to inconsistencies in the practice of international organizations and the introduction into their proceedings of certain ideas and concepts which do not properly belong there at the present time. In the light of the past experiences of international organizations, it may be concluded that it is now essential to find an exclusively legal criterion for purposes of admission and membership in these bodies. Bearing in mind the necessity for the universality of membership, as well as the effective implementation of the policies and principles of international organizations, the new criterion should be aimed at striking a balance between the principle of universality and the need for the effectiveness of international organizations.





# THE INEQUALITY OF THE APPLICABLE LAW\*

By RONALD GRAVESON<sup>1</sup>

THINKING about private international law for most of one's working life makes it possible to discern not only the positive high peaks in this panorama, but the negative features of desert and abyss. From time to time in recent years we have sought to draw attention<sup>2</sup> to one of these negative features, the exclusiveness in history, and fortunately to a far less extent today, of what we may call the private international law club. This club consists of those legal systems regarded by its members as fit to participate in the international operation of private international law, whether in the matter of the application of their law, the jurisdiction of their courts or the recognition and enforcement of their judgments. Closely connected with this matter is the larger question of the evolution of private international law in individual systems and the subsidiary question of the link, such as may exist, between the stage of evolution of a system and its qualifying for membership of the club. This leaves the further question of how to deal with those legal systems that remain candidates for election to membership.

Little firm progress is possible in the consideration of these problems without a preliminary inquiry into how, when and why the conflict of laws came to exist at all. Accordingly, in such a preliminary study<sup>3</sup> we have examined these questions in modern and primitive societies and by applying our philosophy of the essential character of law in society to the circumstantial evidence of history, have submitted the logical conclusion of the existence of the idea of the applicable law from very early times. May we now leave this preliminary question of origins and deal with the substantive one of the applicable law?

## PART I

### THE INEQUALITY OF THE APPLICABLE LAW

It may well appear that this study is, among other things, an object lesson on the danger of *a priori* thinking. Its title could have been 'The Equality of the Applicable Law', thereby conforming to a widely held

\* © Professor R. H. Graveson, 1981.

<sup>1</sup> Professor Emeritus of Private International Law in the University of London.

<sup>2</sup> *Conflict of Laws* (7th edn., 1974), pp. 41-2; 'Problems of Private International Law in Non-unified Legal Systems', *Recueil des cours* 141 (1974-I), pp. 198-9.

<sup>3</sup> 'The Origins of the Conflict of Laws', in *Festschrift für Konrad Zweigert* (1981), pp. 93-107.

assumption of the validity of its proposition. For *a priori* thinking is a close relative of wishful thinking. Yet for generations we have recognized the pre-eminence of the *lex fori*: eighty years ago A. V. Dicey formulated his general principles in terms of the legal systems of *civilized* countries.<sup>1</sup> If we pause to consider the implications merely of these two matters we may be led to conclude that the axiom of private international law is not the equality of legal systems, but their inequality. What inferences follow from this possible conclusion remain for discussion. Our first task is to examine the evidence of inequality while seeking to avoid an equally insidious trap of assuming that under all possible circumstances equality is necessarily preferable to inequality.

We have already tried to show<sup>2</sup> that the basic idea of law is uniform in all times and places in the sense of being a body of rules of conduct regarded as obligatory by members of a society and sanctioned by the political authority of the State. This idea, based on necessity and reflecting the human preference for order as against chaos and for association as against isolation, is manifested alike in primitive and highly sophisticated systems. It is seen in systems as diverse as socialist and western democratic societies or the very different but no less rational approach of oriental law in its concern for individual personality. Yet side by side with this unity of concept one finds the diversity of content and the divergence of legal systems one from another which is the justification for the science of comparative law. It is also in the particular case the justification for the present inquiry into the inequality of the applicable law.

For equality is a relative term in the sense that it must be considered in connection with the particular aspect of a relationship under discussion. For the purpose of our discussion we take equality as referring to equality in authority. But before we consider the extent of inequality in private international law we might examine for a moment legal inequality in national systems. We may start from the very sources or branches or forms of law where in various systems legislation, case-law, custom, written and unwritten law vary and differ from one another in their authority and may be subject to different processes of diminution of that standing, such as desuetude and onus of proof. Areas of law may differ in authority absolutely, they may differ in relation to other forms of law or they may differ in their treatment of whole categories of persons, for example on the basis of nationality, political belief, religion or sex. The modern movement towards equality of treatment of all persons within national systems has still far to go.

<sup>1</sup> Dicey, *The Conflict of Laws* (1896), General Principle No. 1 (p. xliii), explained in Introduction, pp. 29-30. Dicey did not consider the preliminary question of selecting the law by which any particular country is characterized for his purpose as civilized or otherwise. Doubtless every court in the world would regard its own country as civilized; but no court asks this question about itself, only about others; and the unformulated, possibly instinctive, answer appears always to have been that the forum applies its own principles.

<sup>2</sup> 'The House of Law', in *Perspectives of Law* (1964), p. 131.

In public international law may the equality of legal systems be regarded as co-extensive with the equality of States? To what extent are national States equal? The idea of equal membership of the family was linked historically with the political if fratricidal brotherhood of European sovereigns throughout the Middle Ages. In the Renaissance theories of natural law it may have been maintained that States had an inherent equality, but for centuries qualifications to this abstract equality have existed and increased. The first qualification was that States should be members of the family of nations, a circular definition depriving States which were not members of that family of the status of statehood, and a concept still basic in the principles of recognition in international law. The relative liberality of earlier centuries was abandoned in the nineteenth century in the face of colonial expansion to limit international statehood to a score of States and to exclude many of the native societies of Africa, Australia and North America. The new and important factor in the twentieth century, however, is the creation of the League of Nations and later of the United Nations Organization. The Charter of the United Nations granting sovereign equality to all its members<sup>1</sup> could be no more than the contemporary manifestation of the old European club of the family of nations except for the fact that the United Nations now contains some 150 members. Does their sovereign equality connote equality of their legal systems? It is at this point that we may discern a divergence of authority in the area of international law.<sup>2</sup> If more were needed one could mention the most-favoured-nation treatment even within the family of nations and the privileges derived through bilateral and multilateral treaties by individual States and groups on a regional or functional basis.

A situation which could give rise to the inequality of the applicable law occurs with regrettable frequency in our times, and indeed in our country.<sup>3</sup> Where, as in the United Kingdom (unlike France or the United States of America), provisions of a treaty which involve a change of internal law can only be made effective through legislation, a parallelism is created between public and private international law. Does the international wrong of failure to implement a treaty obligation diminish the standing of that country's internal law for the purpose of private international law? So far as the English courts are concerned it is not considered that the foreign applicable law would be degraded on that account. The courts recognize the need to apply municipal law, their own or foreign, so far as possible in conformity with international law; but this is a persuasive, not an imperative, constraint which would not prevail in cases of treaty obligations requiring implementing legislation. This aspect of the general relation of public international law and municipal law (including private

<sup>1</sup> Article 2 (1).

<sup>2</sup> On this general question see J. A. Andrews, 'The Concept of Statehood and the Acquisition of Territory in the 19th century', *Law Quarterly Review*, 94 (1978), p. 408.

<sup>3</sup> See F. A. Mann in this *Year Book*, 48 (1976-7), pp. 19-28.



international law) cannot be pursued here, but may be observed as an instance of the excessive detachment of these two bodies of law, a duality which in some cases invites the charge of duplicity.<sup>1</sup> But a corresponding detachment cannot be expected when English or Scottish law becomes the applicable law in proceedings before foreign courts, whose attitude may be affected by considerations of public policy so as to ignore or modify foreign applicable law incompatible with treaty obligations binding both the forum State and that of the chosen law. Apart from the factor of international morality this situation constitutes a cogent reason for avoiding international wrongs.

The problem of the inequality of the applicable law is by no means new, though it has in the past been treated very properly as part of the entire question of the inequality of legal systems. To treat it as a separate and subsidiary question by no means excludes the importance and the relevance of the question of the equality or inequality of principles of choice of jurisdiction, but the applicable law is a more important aspect of the general problem. In the sense of being part of a general question, it has been examined by several jurists of recognized authority. Professor Kollwijn<sup>2</sup> was concerned particularly with the equality of Western and non-Western legal systems, notably in relation to colonial and imperial powers. He refers to French legal theories, which start from the postulate of the superiority of French law over colonial law, in the sense of its civilizing mission in the colonies. In contrast he refers to the fundamental equality of laws in the former Dutch colonial empire, citing the basic principle of Dutch legal equality 'that one can never call one legal system in itself higher or lower, better or worse than another. There is no standard by which to measure it.'<sup>3</sup> On the other hand, Professor Karl Neumeyer<sup>4</sup> contended that there was no valid local law in German African colonies before Germany arrived. Professor Wengler<sup>5</sup> has long been interested in this problem. He illustrates the historical inequality of legal systems and refers to provisions reflecting the modern counterpart, such as those of German law favouring nationals as against foreigners.<sup>6</sup> He could have added that although the East European systems base legal capacity on *lex patriae*, Soviet law governs the legal capacity of all persons living in the U.S.S.R. and that of Soviet citizens living abroad.<sup>7</sup> He rightly identifies preference

<sup>1</sup> See the cases cited by F. A. Mann, loc. cit. (previous note), pp. 20-1.

<sup>2</sup> 'Conflicts of Western and Non-Western Law', *International Law Quarterly*, 4 (1951), p. 307.

<sup>3</sup> Loc. cit. (previous note).

<sup>4</sup> *Die Zeitschrift für Völkerrecht und Bundesstaatsrecht* (1912), cited by R. D. Kollwijn, 'Conflicts of Western and non-Western Law', *International Law Quarterly*, 4 (1951), p. 311.

<sup>5</sup> 'General Principles of Private International Law', *Recueil des cours*, 104 (1961-III), p. 273; 'Les Conflits de loi et le principe d'égalité', *Revue critique de droit international privé*, 52 (1963), pp. 205, 503.

<sup>6</sup> For example, Article 12, limiting enforceable foreign judgments in tort against a German defendant to the amount permitted by German law; Article 17, giving German law and nationality a dominant function in divorce.

<sup>7</sup> See generally Szász, *Private International Law in the European People's Democracies* (Budapest,

for the *lex fori* as the most frequent exception to the equal application of laws. But despite the contrary evidence he himself adduces, Professor Wengler seems to assume the premiss of equality of legal systems, and beyond urging non-discrimination and favouring the international unification of private international law (methods with which we readily agree), he offers no easy solutions and does not deal with the problem of the relative evolutionary depth of legal systems, one of the main causes of their legal inequality.<sup>1</sup> Professor Schiller in his tribute to Professor Kollewijn touched on aspects of this problem in African jurisdictions,<sup>2</sup> though American jurists generally have been less concerned with the abstract question of the equality of legal systems than with the positive and realistic question of the search for the best law in the solution of problems. Thus Professor Cavers has established principles of preference,<sup>3</sup> Professor Ehrenzweig's attachment to the *lex fori* throughout his writings is well known,<sup>4</sup> while Professor Hancock<sup>5</sup> supports choice based on 'better law analysis'. The principle of preference is in itself an apparent rejection of equality in the interests of necessary choice. It brings into issue the whole question of the principles of choice of law and choice of jurisdiction in private international law and incidentally questions the validity, or at least the meaning, of the concept of equality. For the basis of the entire system is the selection of one or another applicable law as being preferable to all others according to the principles of the particular system of private international law operating in relation to the case in hand. What, then, has happened to our problem? The problem remains, for the paradox of choice of law is unreal. In an ideal world, as in the theory of most authorities, it should be a choice among equals. The problem of inequality among the candidates for choice is the different matter to which we must now turn our attention. We may now, perhaps, revert to our earlier question. The argument of the equality of private international law systems from the technical equality of States in public international law is of course fallacious for various reasons, but most notably that the recognition of a country's system of law as that of the applicable law does not depend upon

1964), pp. 192-4; see also Mädl, *Foreign Trade Monopoly—Private International Law* (Budapest, 1967), ch. 6.

<sup>1</sup> See also Wengler, 'Rechtsgleichheit und Vielheit der Rechte', in *100 Jahre Deutsches Rechtsleben* (1960), vol. 1, p. 246; Bischoff, *La Compétence du droit français dans le règlement du conflit des lois* (1959), dealing with the equality of territorial laws.

<sup>2</sup> 'Conflict of Laws in East Africa', in *De Conflictu Legum* (1962), p. 430.

<sup>3</sup> *International and Comparative Law Quarterly*, 26 (1977), p. 728.

<sup>4</sup> Notably his *Treatise on the Conflict of Laws* (1962).

<sup>5</sup> In 'Policy Controlled State Interest Analysis in Choice of Law, Measure of Damages, Torts Cases', *International and Comparative Law Quarterly*, 26 (1977), at p. 823, he writes: 'Better law analysis (the demonstration that a particular rule of domestic law supports policies that no longer command respect and subverts those that do), has become the most important and judicially popular technique for resolving true conflict cases. It is important because it has resulted in total abandonment of what was once considered an axiom of the choice of law process: that the laws of every State, however anachronistic, must be treated as equally fair, rational and well suited to modern conditions.'

either that country's existence or recognition as a State in public international law. The parallelism between the recognition of the State in public international law and of its system of law as of equal authority in private international law is not complete. It is valid to this point, however, that the legal system of a recognized member of the family of nations has never been denied some degree of recognition in private international law, even though at times the law of non-members of the family of nations has been given full authority within the operation of private international law. Whereas recognition for the purpose of public international law is based on a political factor, recognition of the foreign law and its judicial system has depended more on its technical adequacy than on its political acceptability.

The inequalities between national and foreign systems of private international law are well known. The most striking of them are to be found in the following matters:

1. The principle of public policy, under which even the recognition of the equal authority of the foreign system is subject to its exclusion on the ground of the public policy of the forum. This is a principle on which widely different views are held. Whereas some of the French writers, for example, regard public policy as one of the pillars of the system, as did Mancini,<sup>1</sup> in England it is regarded as an exceptional and undesirable, even if occasionally necessary, limitation on the normal operation of private international law.<sup>2</sup> It was in this spirit that the writer sought its limitation to those cases where objection to the foreign law was not technical or trivial but serious and substantial, and proposed words which have since become the standard form of 'manifestly incompatible with the country's public policy'.<sup>3</sup>

2. We have already mentioned by way of example the provisions of the Introductory Law to the German Civil Code making the acceptance of foreign law dependent on its equivalence with provisions of national law under certain circumstances.<sup>4</sup>

3. The conditions for the recognition of foreign judgments are often more stringent than the conditions required for the enforcement of judgments of the forum, although the policy of certain systems has been to assimilate these requirements. At times one finds the imposition of conditions that almost deny the recognition of the foreign court's system of private international law, such as the requirement that a foreign decree of divorce shall only be recognized if it has been pronounced on principles of private international law analogous to those of the court called upon to recognize the foreign decree.<sup>5</sup>

4. In certain systems, notably in the common law, the entire body of

<sup>1</sup> Graveson, 'Comparative Aspects of the General Principles of Private International Law', *Recueil des cours*, 109 (1963-II), pp. 41-4.

<sup>2</sup> Graveson, *Conflict of Laws* (7th edn.), pp. 165-70.

<sup>3</sup> e.g. Convention on the Recognition of Divorces and Legal Separations, Article 10.

<sup>4</sup> Above, p. 234 n. 6.

<sup>5</sup> Compare the more liberal principle in Article 6 (b) of the Convention on the Recognition of Divorces and Legal Separations.



foreign law is treated as a question of fact, with two notable consequences. In the first place the court takes no judicial notice of it and the law must be proved by expert witnesses as in the case of any other special fact; and secondly, where appeal is permissible only on questions of law, no appeal is accordingly possible on questions of foreign law, since this is for the purpose not law, but fact.

5. The most widespread example is the preference of the court for its own law. This preference, raised almost to the level of a theory by writers of the distinction of Ehrenzweig,<sup>1</sup> may be based partly on a belief that the national law is better than any other, partly on time-saving unwillingness on the part of lawyers and judges to examine foreign law, but most of all, it is thought, on the immature state of development of the entire system of private international law. The evolution of this system is a movement from the exclusive application of national law to all matters coming before national courts, first to a recognition of the relevance of foreign law and later to a development of principles on which the foreign law should be applied in preference to the *lex fori*. This evolution has made great progress but still has far to go. Its progress may be measured by the relative diminution of the influence of the *lex fori* until in principle it occupies a part no more important than that of any other legal system that might be applicable.

6. Finally, legislation itself may give special preference to one legal system as against another. Professors Webb and Auburn<sup>2</sup> give the example of section 17 (2) of the Adoption Act 1955 of New Zealand, granting special recognition to the adoption orders made in a Commonwealth country or the United States of America or as directed by an Order in Council of the Governor-General. We may balance this by reference to the treatment of creditors in an English bankruptcy under the Bankruptcy Acts 1914-26. In *Re Kloebe*<sup>3</sup> Pearson J. asserted the equality of treatment of all creditors, whether from the furthest north or the furthest south. Indeed, the judicial oath which every English judge is required to take<sup>4</sup> requires him to do justice to all men without fear or favour, affection or ill will. If in the light of the inequality of treatment of legal systems the terms of this oath induce feelings of cynicism or hypocrisy, it should be remembered that the expression 'according to law' in its words is capable of a narrow as well as a wider meaning, just as the term 'the law of a country' has this ambiguity. It is gratifying to note the efforts made in the new world over the past century to achieve equality of treatment of local and foreign law through conventions and congresses on private international law.<sup>5</sup>

<sup>1</sup> Op. cit. above (p. 235 n. 4).

<sup>2</sup> *International and Comparative Law Quarterly*, 26 (1977), p. 971 at p. 982.

<sup>3</sup> (1884) 28 Ch. D. 175.

<sup>4</sup> Promissory Oaths Act 1868, s. 4, as re-enacted: Graveson, *Conflict of Laws* (7th edn.), p. 8.

<sup>5</sup> Valladão, 'Actualisation et spécialisation des normes du droit international privé des états américains', *German Yearbook of International Law*, 21 (1978), p. 335.

The inequalities to which we have referred have been considered on a horizontal plane in the sense of relations between legal systems in a similar stage of development. This is the traditional framework of discussion of relations within the legal community described by Savigny as based on the principles of Roman law and the Christian faith.<sup>1</sup> This is the operative dimension of Dicey's important premiss that the subject of the conflict of laws deals with relations among the legal systems of civilized countries; and he goes on to define civilized countries in terms reminiscent of Savigny. It may even be thought to have influenced the draftsmen of the Statute of the International Court of Justice, Article 38 (1) (c) of which refers to 'the general principles of law recognized by civilized nations'. Civilization is a relative term which has eluded classification, but in certain cases has excluded societies as ancient and highly civilized as China. In *Wolfenden v. Wolfenden*,<sup>2</sup> for example, the question arose as to the validity of a marriage performed in one of the provinces of China. In the face of the rule that the formal validity of marriage depended on the place of celebration the judge observed, 'It was suggested that I might have to consider whether the marriage conformed to the law of the place where it was celebrated. Well, I have no evidence at all about Chinese law and I am bound to say, having considered the matter, I do not think I could possibly hold that in the circumstances of this case that law was applicable. I do not propose to examine that proposition further.' In gratifying contrast one can place in the balance the Commonwealth-wide comprehension of the Judicial Committee of the Privy Council in dealing with legal customs and institutions from races and systems in various stages of development. In *Isaac Penhas v. Tan Soo Eng*,<sup>3</sup> for example, the Committee upheld a ceremony performed by a Chinese layman in a private house in Singapore between a non-Christian Chinese woman and a Jew, the ceremony including features of the religion of each party. The concept of common law marriage was considered sufficiently wide to comprehend the Singapore ceremony. American courts at least since the United States treaty of 1868 with the Indian nation have shown consideration to less developed legal systems, and have been influenced by the former legal background of immigrants.<sup>4</sup> The American example in which the law of Saudi Arabia was ignored in the decision of tortious liability for an accident taking place in that country has a rational explanation.<sup>5</sup> This horizontal view of the traditional family of nations or, as we have called it, the private international law club, must now be adjusted in the light of the new and vertical dimension of evolutionary inequality among the legal systems of the world. For on the horizontal plane of the traditional family of nations

<sup>1</sup> See van Hecke, 'International Contracts and Domestic Legislative Policies', in *Festschrift für F. A. Mann* (1977), p. 184.

<sup>2</sup> [1946] P. 61.

<sup>3</sup> [1953] A.C. 304.

<sup>4</sup> e.g. *Royal v. Cudahy Packing Co.*, 195 Iowa 795 (1923); *Columbia Law Review*, 23 (1923), p. 489.

<sup>5</sup> *Walton v. Arabian American Oil Company*, 233 F.2d 541; 352 U.S. 872 (1956).

not only have certain foreign laws fallen short of consideration, such as those of China and Turkey, but in two other respects the exclusiveness of the family has been asserted. First, in respect of religious laws, non-Christian forms of marriage have in certain circumstances been ignored, for example Moslem polygamous marriages.<sup>1</sup> Secondly, tribal laws received short shrift in the nineteenth century, as was evidenced in the case of *Re Bethell*.<sup>2</sup> In both these areas the attitude of courts and legislators has become increasingly liberal since 1950 under the impact of immigration, especially from the Indian sub-continent.

The traditional attitude does not denote religious or racial discrimination as such. Rather it is considered a blinkered application of law within the traditional framework of the common civilization of western Europe from the thirteenth century, which in its legal aspects had developed largely under the influence of the Italian schools and notably Bologna. Within that civilization the idea of law was a broadly common concept based on Roman law and the common law, and perhaps adequately represented in the theories of John Austin in the early nineteenth century as a system of imperatives, compatible with the mature legal systems, notably those of England and Germany, about which he was writing. Until the time of Austin private international law had hardly been distinguished from public international law (both being part of the law of nations), which again had grown up in the same European framework of culture and civilization and as one of its principles had developed the natural law idea of the equality of States, an idea, as we have seen, that had many exceptions. But in so far as it involved equality it was only equality as members of the family of nations, and it seems at least from the time of Austin that the principle was not considered as necessarily applying to private international law. The family of nations now has more than 150 members in the United Nations in varying stages of social and legal development and when in fact they constitute a majority of such bodies as UNCITRAL, charged with unifying the commercial laws of the world, it becomes necessary to examine more closely the validity of the axioms on which European private international law has proceeded for so long. Although we have considered particularly the applicable law, the question of jurisdiction is almost as important in the sense that it is often institutions rather than law itself that are underdeveloped. Thus the development in England of the rules for service of process out of the jurisdiction, starting with the Common Law Procedure Act in 1852 and now contained chiefly in Order 11 of the Rules of the Supreme Court, were motivated in part at least by the need to provide judicial hearing for cases that would otherwise have fallen to be heard by a system of courts regarded as underdeveloped.

<sup>1</sup> e.g. *R. v. Superintendent Registrar of Marriages for Hammersmith, ex parte Mir-Anwaruddin*, [1917] 1 K.B. 634.

<sup>2</sup> (1888) 38 Ch.D. 220.



The principles of private international law are constructed on the application of space and time to particular problems. These factors apply whether the question is one of the applicable law or the appropriate jurisdiction. Thus in respect of the principle of space one considers whether the law of this country or that country should govern the issue or whether the courts of this country or that country should have jurisdiction. The question of time is relevant in deciding whether the law of the chosen country should be applied as it stands now or as it stood at some time in the past.<sup>1</sup>

It would seem that beyond the factors of space and time we must now take account of the further factor of evolutionary depth of a legal system. It is a suggestion that we have ventured to make in other places.<sup>2</sup> We should do so first by recognizing all systems of law and jurisdiction as relevant for purposes of private international law and not just those we regard as of approximately our own standard. Whether a body of rules qualifies as a system for this purpose is discussed below. Secondly, we should recognize that the different stages of development of a legal system, including its system of courts, require consideration as a relevant factor in questions of the conflict of laws. If we seek reasons for taking account of this third factor we may find them in the ultimate justification for all law, namely necessity; we may find them in the technical satisfaction of completeness of reference; and we may find them in the ethical concept of the just decision that takes account of all relevant factors. In short, the reason for taking account of the inequality of development of legal systems is an instance of the reason for the existence of private international law itself. There are thus not only historical reasons for taking account of this new factor, but political reasons in the extensive membership of the United Nations Organization, and sociological and humanitarian reasons that extend beyond that membership to non-members, including primitive tribes and their customary law of such matters as land tenure and marriage. The alternative would be a continued exclusion of law normally applicable, not for reasons of public policy, but only for reasons of relative underdevelopment or, in the case of certain well-developed systems, exclusion through unfamiliarity as in the case of Chinese law.

The initial steps in acceptance of this third factor in private international law are first a recognition of the need for universal application of the system of private international law so far as humanly possible by all countries and all systems in this shrinking world; and secondly a liberalizing of the concept of law itself to include systems that differ in important respects from western European concepts of law. For the western European concept as a body of imperatives exemplified in the

<sup>1</sup> The *Report of the 24th Commission of the Institute of International Law* deals with the problem of time in private international law (1979): *Annuaire de l'Institut de Droit International*, 58 (1979), Pt. 1, pp. 1-96; Pt. II, pp. 179-90.

<sup>2</sup> *Conflict of Laws* (7th edn.), pp. 41-2; *Comparative Conflict of Laws* (1977), pp. 308-10.

positivism of Austin and characteristic of developed systems bears little relation to law in primitive societies, where it may be no more than a body of general guidelines which in the particular case are negotiable in the interest of keeping peace in the society. Furthermore, the applicable law may not be ascertainable in advance, but only after the particular issue has been decided within the primitive group and law thereby established for the purpose in hand. The matter is thus complicated by the time factor. It may be illustrated by an example used in the writer's Hague Academy lectures, that of an American Indian chief settled in a reservation in the State of North Dakota. He had recently lent certain tribal artefacts to an exhibition of native art being held in Germany. During the course of the exhibition the chief died and the exhibition organizers sought advice in Germany as to entitlement to the property lent to the exhibition. What law would a German court apply to the succession to those things in the event of a tribal dispute as to title? Not only would the answer to the tribal question be problematical (even within the tribe) until an actual decision had been made, but the constitutional position of Red Indians in the United States of America, which would probably also arise on a reference to a national law, is by no means clear. The United States government in 1868 made a treaty with the Indian nation by virtue of which the various tribes continued to follow their own legal systems within the designated reservations and notably in matters of personal law and tribal custom. Our starting-point in inquiring into this problem must be that no relevant law should be ignored merely because it is difficult to discover. Although to ignore the law was the nineteenth-century solution, it is no longer regarded as acceptable today.

This is an extreme example of the need for the application of the new factor of evolutionary depth in recognizing the relevance and ensuring the proper application of systems of law at different stages of development. An example more familiar in the Federation of Nigeria exists in conflicts between the sophisticated European system of western Nigeria and the much less developed system of northern Nigeria, based as it is almost entirely on Islamic law. In cases involving conflict of laws relating to commercial disputes the courts must be greatly tempted to regard the western Nigerian system as the proper law in preference to that of northern Nigeria. These different phases of legal evolution within a single federation create borderline problems of law and jurisdiction which perhaps only a system of mixed courts would be able to solve in the course of a generation, a method used successfully elsewhere in Africa. In the meantime, however, much could be done by a simple rational act of will on the part of all concerned with problems of the conflict of laws.

## PART II

## THE DIMENSION OF DEPTH

Having sought to trace the beginnings of private international law<sup>1</sup> and discussed the general question of the equality of authority of legal systems for the purpose of our subject, we shall now try to consider more specifically the consequence of the inequality of legal systems which may be regarded as the factor or dimension of evolutionary depth.

We have considered various reasons for the unequal treatment of otherwise applicable law, such as the operation of the doctrine of public policy, evasion of the law, preference for the *lex fori* and other matters.<sup>2</sup> Where legal systems are on approximately the same level of development their relations with one another are horizontal in the sense that a European system, for example, would look sideways, not upwards or downwards, at another European system, and would expect a similar attitude from its neighbours. Thus the problems of inequality that arise as between systems on the same level of development, such as the limitations and exclusions we have mentioned, bear no relation to the dimension of depth we are considering. They are of no interest to our particular question beyond their function as a means of ultimate control by the *lex fori* when the chosen law is unacceptable, e.g. because of its barbaric provisions. We have spoken of the strata of legal systems; our problem deals with the relation between systems at different strata of development. It may therefore be referred to as a vertical rather than a horizontal relationship. The contact of systems at different levels of development may arise from their primitive stage, from their native quality or from their religious character, all of which may present these systems with problems of the kind we are considering, not only among themselves but also in relation to the western European type of system with which we are more familiar. It is considered appropriate to underline the relevance, indeed the importance, of this third dimension of private international law, although in this short study it is not possible to do more than outline the problem and indicate possible approaches to its solution. Yet to identify the problem itself indicates some ways of reducing or removing it. Part of the difficulty, for example, is that of the isolation of a legal system through lack of communication, either of the language in which it is expressed, such as Sanskrit or Chinese in respect of Buddhism, or the use of concepts of a totally different way of life.<sup>3</sup>

It may be worth recalling that vast areas of the world have different conceptions of the function of law in society. The task of co-ordinating legal systems with different philosophical bases into a general system of private international law is not easy, but will at least be facilitated by its

<sup>1</sup> 'The Origins of the Conflict of Laws', in *Festschrift für Konrad Zweigert* (1981), pp. 93-107.

<sup>2</sup> *The Conflict of Laws* (7th edn.), ch. 5.

<sup>3</sup> Bozeman, *The Future of Law in a Multicultural World* (Princeton University Press, 1971), p. 425.



recognition. The problem is represented by the relations of western European systems, identified by individual rights on the basis of Roman law and the common law, contentious procedure and the tradition of competing jurisdictions on the one hand to the socialist systems, based on the concept of legality defined in terms of the interest of the State, in which for the purpose of private international law one is able to distinguish internal policy and international relations, for example in trade; and on the other to oriental and African systems, in which emphasis is on the peace of society rather than the interest of the individual, where social harmony involves an attitude of opposition to litigation and where law is regarded as the last resort in any conflict. These last-named systems are sufficiently sophisticated to recognize the rarity of the case in which all the right is on one side and all the wrong on the other, so that they seek, not an absolute answer in terms of black and white, but a solution that will preserve the personality of each contender in a dispute. Part of the problem, again, is to ensure the acceptance in oriental and African societies of the normality of private international law for the solution of relevant problems. A main step towards the solution is the finding of suitable general principles of universal application that can operate effectively in cases between systems of different philosophical bases. Of available principles to be extracted from practical experience there is much to commend the common statutory precedent of 'justice and equity' found in British Commonwealth and colonial legislation and relevant particularly to disputes involving conflict between native customary law and the statute law of the colonial power. The operation of this principle is a practical analogy to the theory of justice as a basis of private international law that we have sought to suggest since 1948.<sup>1</sup> Dr. Francescakis, writing of problems in this area,<sup>2</sup> observes that the solution of conflicting laws should be 'le but de bonne justice et non le but du respect de l'autonomie des lois en conflit qui prévaut aujourd'hui dans les conflits internationaux'. We have sought to reconcile these various concepts of law by abstracting the common features of them all in basic terms of necessity for social existence. Our particular problem is to reconcile the individual systems, which obviously have different stages of evolution, in their day-to-day relation with one another in international social and commercial intercourse.<sup>3</sup> One minor aspect we may discover, that should be noted at the outset, is a possible difference in regard as between written and unwritten law. If those countries of the code, in particular France, regard written law as a superior if not the only kind of true law, it may be that their friends in common law systems regard written law as a secondary and supplementary kind of precept to their own somewhat miscalled unwritten law.

<sup>1</sup> *Conflict of Laws* (1st edn., 1948), pp. 5-7.

<sup>2</sup> 'Problèmes de droit international privé de l'Afrique indépendante noire', *Recueil des cours*, 112 (1964-II), p. 269 at p. 289.

<sup>3</sup> See *International Encyclopaedia of Comparative Law*, vol. 2, ch. 1.

The distinction is unimportant in highly developed systems such as those we have mentioned, but it may well be important in relation to native systems of law, which are almost entirely unwritten. As we have seen, this fact alone raises the difficult question of proof of existence and the subsidiary question of whether one is proving fact or law. The problem we are considering is contemporary. We need not look into its history beyond the nineteenth century. The Concert of Europe in 1814 excluded the Ottoman Empire from western systems of public international law. Wheaton<sup>1</sup> distinguished Christian and Moslem nations, so that when Dicey published the first edition of his *Conflict of Laws* in 1896 he was conforming to the accepted pattern of his age in speaking of the system of conflict of laws as one between civilized countries,<sup>2</sup> and described them as excluding not only Turkey as a Moslem nation but China with its ancient and distinguished civilization. The courts from time to time met problems relating to the co-ordination of their own and non-Christian legal systems, for example on the possibility of obtaining a domicile in a non-Christian country<sup>3</sup> and in dealing with the difficult problems of polygamous marriages.<sup>4</sup> Professor Schiller<sup>5</sup> refers to the inferior ranking of the Indies European law to that of the Dutch private law, while Dr. Francescakis<sup>6</sup> observes that the object of private international law was to safeguard the autonomy of the societies concerned.<sup>7</sup> Yet the missionary and cultural function of French law results in the relative inequality of the doctor and his student.

Legal systems we seek to compare are unequal in many respects. They are unequal in sophistication, unequal in their scope, unequal in their adequacy to deal with modern and contemporary problems, quite apart from the philosophical differences between them. Some of them may be so primitive and virtually unascertainable as to fall outside the practical limits of this paper. Of such primitive systems it can only be urged that a fair attempt should be made to discover their existence and content when it appears that they would normally be the applicable law and to apply them accordingly if practical. Our later observations should be read subject to this qualification. What, then, is the equality that we are considering in this dimension of depth which presupposes at least inequality in one matter or respect? As we mentioned in dealing with the equality of the applicable law, the kind of equality we are considering is that of authority for the purposes of private international law, including matters of jurisdiction and the recognition of foreign judgments. The

<sup>1</sup> *History of the Modern Law of Nations* (New York, 1845), p. 555.

<sup>2</sup> 1st edn., p. xliii, p. 29.

<sup>3</sup> *Casdagli v. Casdagli*, [1919] A.C. 145.

<sup>4</sup> Graveson, *Conflict of Laws* (7th edn.), ch. 8B.

<sup>5</sup> 'Conflict of Laws in Indonesia', *Far Eastern Quarterly*, November 1942, pp. 31-47 at p. 34.

<sup>6</sup> 'Problèmes de droit international privé de l'Afrique noire indépendante', *Recueil des cours*, 112 (1964-II), p. 285.

<sup>7</sup> Loc. cit. (previous note), p. 288.

question for consideration is whether systems at various levels of evolution coming into relation with one another should be treated on a basis of equality for this purpose of private international law. It must be recognized that systems may be inadequate to deal with modern commercial practice and international trade, or legal devices relating to property, just as many so-called sophisticated western European systems may be inadequate or unprepared to deal with such established usages of less developed systems as slavery and concubinage. In this situation the question arises of whether equality of authority is necessary or desirable and if so, how it may be achieved. The necessity is a simple reflection of the difficulty and inconvenience of transactions across frontiers without principles of the conflict of laws. It is considered that equality is desirable, first to correspond to the equal status of members of the United Nations in public international law. There is thus a political reason for the recognition of the authority of legal systems of all members of the United Nations on equal terms. Although the equal authority of member States has been criticized on various grounds, those grounds have rarely, if ever, extended to the differences among the legal systems of the States; and rather than arguing for the equality of authority of those legal systems it would seem more rational and justifiable to assume the validity of that equality and await arguments against it.

The same assumption should be made about developed States that are non-members of the United Nations, such as Albania, and the sub-units of non-unitary States, whether members or not, such as Scotland, Massachusetts, Ontario and Victoria. Secondly, equality of authority is necessary because any departure from this principle leads as a matter of degree to the eventual exclusion of undeveloped legal systems. The reconciliation of equality and authority for purposes of private international law with the inequality in evolution and in other respects of the various systems lies in a principle of special consideration, so that the legal systems involved in any particular case can be properly regarded as of equal authority on the issues in dispute. The non-application of local law in the *Abu Dhabi* arbitration<sup>1</sup> reached a satisfactory award, but by a route that unnecessarily ignored the most relevant legal system.

Finally, the reason for treating all systems as of equal authority for private international law is the reason for the existence of private international law itself. It is necessity in international intercourse and the achievement of justice by taking account of all relevant legal systems.

The unequal authority of legal systems in the private international law of today's world is therefore considered undesirable and unnecessary. What solutions can be proposed to correct this legal imbalance? Can one transpose into a vertical dimension of time the principles of reconciliation advanced by Roscoe Pound for the reduction of conflict between public, social and private interests with a view to the more efficient working of

<sup>1</sup> *International and Comparative Law Quarterly*, 1 (1952), pp. 250-1.



society? The transition would not be easy, but the development of principles of co-ordination among legal systems, diverse yet relevant to a single issue, has to be faced. This must be done not only for the immediate solution of practical problems, but for the long-term development in the area of private international law of undeveloped systems in order to fit them for their place in the single world we inhabit. The first step is the most difficult because it is, as we have already suggested, an act of will on the part of all concerned in making the principles of private international law generally applicable to all relevant situations and all legal systems. Professor Karl Neumeyer described<sup>1</sup> the situation in Italy as long ago as the sixth century A.D. in which the validity of different laws varied according to the extent of knowledge of them and the extent of the common law, a situation in which the acceptance of one particular system or another depended on the willingness of the legal profession to entertain it. It seems that the Longobardish notaries were particularly difficult in this respect. But given the act of will and the co-operation of the judges and the legal profession, there is no reason why the general concept of private international law should not be found acceptable, for it carries its own rewards. The example of medieval Italy, in which private international law was highly developed even before the invention of personal and real statutes, is proof of this contention. Religious systems of law have notably developed their own principles of recognition of the rules of other religious systems, though the example is less one of a vertical than of a horizontal co-ordination of law. The historic alternative widely applied in the relations between oriental and western European systems in the nineteenth century was that of extra-territoriality, but it is a system that has probably had its day and can hardly be considered as a viable alternative to recognition of the equal authority of legal systems in a general world-wide pattern of private international law.

In the search for principles of co-ordination in this dimension of depth, it is necessary to examine foreign concepts as fundamental as rejection of the separation of law and jurisdiction, the bases of the personal law, the concept of property and succession, unusual forms of contract such as potlatch, varieties of personal status such as prodigality, civil death and statelessness, with a chastening realization that concepts familiar in one's own system may be strange and foreign when looked at from the point of view of other systems. In these circumstances the process of characterization must be applied with flexibility and in a spirit of liberalism. It might well be necessary, for example, to reverse the normal doctrine of characterization by the *lex fori* in favour of a reference in the first place to the *lex causae*, and only when that reference fails to fall back on a positive analogy with the *lex fori*: positive in the sense that one should approach the problem in the spirit of finding rather than of failing to find an analogical

<sup>1</sup> *Die Gemeinrechtliche Entwicklung des Internationalen Privat- und Strafrechts bis Bartolus* (Part 1, 1901), p. 130.

solution. In the third place we should develop rules to take account of less developed systems. The separation of law and religion, such as occurred in Turkey in 1926, is commonly regarded as a mark of progress towards a sophisticated western type of legal system. Correspondingly, those systems in which law is merely one aspect of a total religious way of life such as Islam, in Israel and in parts of the east, represent an intermediate stage of legal development of which account has been taken not only horizontally among themselves but in certain respects in a vertical dimension for a century by western European systems. This is a notable exception to the general policy of the nineteenth century of ignoring less developed systems as not belonging to the private international law club of western Europe. Thus the existing rules of private international law<sup>1</sup> may help us in finding analogies for the treatment of systems on a different level of development in respect of other fields than those of family law and succession, to which religious law is particularly applied.

The establishment of rational links or principles of reconciliation within these vertical differences in the stages of evolution of legal systems is a matter of some importance, not least in considering the relation of law and jurisdiction in questions of religious personal law. The aim of a just solution in an international sense calls for a sensitive adjustment to the special character of legal systems. This factor of evolutionary depth will not be relevant in every case, but in many cases it requires recognition. Perhaps the example of religious personal law provides our way in to the more general problem we are considering. For systems of private international law have acquired a certain experience in dealing with that aspect of our problem. Systems of religious law have specially relevant features. They possess their own tribunals, and broadly it can be said that where religious law is permitted to operate, its judicial system will also be recognized as having corresponding jurisdiction. But this proposition must be qualified in respect of territorial jurisdiction in contrast to jurisdiction in respect of subject-matter. For while religious law may claim ubiquity and eternity, the organization of religious courts is normally on a somewhat more local and temporal basis. This judicial system does not flow directly from the body of religious law but from the hierarchy of religious authorities under whose auspices the religion is organized and administered. To ascertain the proper judicial authority, therefore, whether it be a court or an individual, capable of determining a question within the range of the law of the particular religion, it is necessary to move in stages. One's starting-point is the territorial system (which itself may be composite) within which religious laws and their courts are allowed to operate. Secondly, one must be satisfied that the particular question for decision falls both within the ambit of the law of the religion concerned and that of the permitted jurisdiction of its courts. The

<sup>1</sup> Graveson, *Conflict of Laws* (7th edn.).

conflictual aspects of the question end there: the subsequent problem of whether the particular court or official within the system of religious courts had authority to do what he purported to do is one of internal organization of the religious legal system. How relevant is the question to the wider recognition of the exercise of this authority is a matter of the recognition of foreign judgments. What we have said regarding the third dimension of conflict, that of depth, is equally relevant to the question of jurisdiction as to that of law. It must be allowed to operate from the starting-point of classifying the decision-making body as one properly contemplated by the question of choice of jurisdiction. In this sense a religious social worker, for example, whose principal function is to repair broken families, may well qualify as a jurisdictional authority for the purpose of the principle.

An interesting example of this necessary adjustment to the factor of evolution may be found in the decision of the English Court of Appeal in *Har-Shefi v. Har-Shefi*.<sup>1</sup> In that case husband and wife were of Jewish faith, the wife being domiciled before marriage in England and the husband in Israel. While the parties were resident in England though domiciled in Israel the marriage was dissolved by religious decree of the Rabbinical Court in London. The husband was deported to Israel, where he remained, and the wife petitioned in England for a declaration that the Jewish divorce had validly dissolved her marriage. The Court of Appeal held (*inter alia*) that jurisdiction existed to make the declaration asked for, even though no other relief were sought; and that the validity of the divorce depended on the law of the domicile, i.e. Israel.<sup>2</sup> These principles were applied by Pearce J. on the wife's substantive petition<sup>3</sup> and the divorce was recognized as effective.<sup>4</sup> Thus the question of recognition of the religious decree was moved from one of choice of jurisdiction (i.e. only the High Court then had jurisdiction in England to dissolve marriages) to one of choice of law (i.e. whether the decree of some other body in England will dissolve a marriage depends on the law of the parties' domicile at the date of the decree). In terms of our particular problem of the search for jurisdiction in a non-unified system *Har-Shefi's* case demonstrates the need for an awareness of the dimension of depth, i.e. in the transition from the territorial path to proper jurisdiction in a secular system of law, that of England, to a religious path in a merged system, the Jewish law. In this search it became clear in *Har-Shefi's* case that questions of jurisdiction and applicable law were inseparable, the former depending, in part at least, on the latter.

<sup>1</sup> [1953] P. 161.

<sup>2</sup> Discussed more fully in 'Judicial Interpretation of Divorce Jurisdiction in the Conflict of Laws', *Modern Law Review*, 17 (1954), p. 501.

<sup>3</sup> *Har-Shefi v. Har-Shefi* (No. 2), [1953] P. 220. See also *Silver v. Silver*, *The Times*, 17 November 1962.

<sup>4</sup> [1953] 1 W.L.R. 1182; [1953] 2 All E.R. 710. The Domicile and Matrimonial Proceedings Act 1973, s. 16 (1), now provides that no proceeding in the United Kingdom, the Channel Islands or the Isle of Man shall be regarded as validly dissolving a marriage unless instituted in the courts of law of one of those countries.



A further instance of the kind of problem that may arise in this process of co-ordination relates to the time factor in the ascertainment or crystallization of the applicable law,<sup>1</sup> as in the example of the Indian chief to which we referred above.<sup>2</sup> There again a certain degree of flexibility is required to take account of the crystallization of the applicable law in respect of the particular point in issue.

We may mention as a fourth pointer towards co-ordination the acceptance of foreign law as law rather than fact. This is a general matter which would only require change in some systems, not in all. The distinction between law and fact is not made universally and even where made does not always carry the consequences of a rather technical nature that are found, for example, in English law concerning proof and appeal. It is an area in which a broad approach is required.

In the fifth place a far more restrained application of doctrines of public policy must be adopted to avoid the exclusion of unfamiliar customs and concepts of undeveloped legal systems. One of the notable features of the English conflict of laws during the past twenty years has been the changed attitude towards polygamous marriages, following the great influx and immigration of persons of the Islamic and Hindu faiths from the Indian sub-continent and parts of Africa. It is possible, accordingly, for western attitudes to change fundamentally in relation to hitherto unfamiliar foreign concepts and institutions. This is merely an example of a large-scale change that has taken place in our lifetimes and could take place in other directions in the co-ordination of legal systems of different kinds.

Finally, one can find statutory examples of the principles of co-ordination in the real and practical situation of Africa. The Kenya Judicature Act 1967, section 3 (2), for example, provides that a decision shall be made according to substantial justice without undue regard to the technicalities of procedure; while the Ghana Courts Decree of 1966, paragraph 64, protects the application of customary law as the personal law, which it defines for the material purposes as the system of customary law to which the party is subject, or if he is not shown to be subject to customary law, then the reference is to the common law. These provisions are examples of statutory solutions to incompatibility between relevant legal systems at different levels of evolution, and although not directly concerned with private international law, nevertheless provide a useful example of effective co-ordination. They also point to the concepts of justice and convenience as guiding principles in the evolution and application of private international law.

In his Chairmanship of the First Commission at the Eleventh Session of the Hague Conference of Private International Law which was responsible for the Convention on the Recognition of Divorces and

<sup>1</sup> See *Report of the 24th Commission of the Institute of International Law on Problems of Time in Private International Law* (1979 and 1981).

<sup>2</sup> P. 241.

Legal Separations, the writer had the good fortune to face the problem of evolutionary depth and propose a solution. The particular instance of this problem was the need to harmonize systems that provided for divorce and those that did not, those that allowed polygamy and monogamous systems, those whose divorce procedures were highly developed and those that were of a simple unilateral type.<sup>1</sup> Thus a second illustration of a recognition of this factor of depth may be taken from that Convention, on which United Kingdom legislation has been based. In its principles that Convention and the legislation based upon it bridge the gap in stages of legal development by providing for the recognition of divorces that have been obtained by means of judicial or other proceedings and are official under the law of the country where obtained. There is in this provision no requirement that the proceedings should be judicial, contentious or even involving both parties in taking action. A unilateral divorce of husband or wife under the appropriate system would be recognized under the Convention and the Act provided it was regarded as proceedings in its own country and effective under that law.<sup>2</sup>

One interesting aspect of this Convention for present purposes is its recognition and treatment of the problem of reconciling legal systems at different stages of development. The legislative solution lay in the acceptance of the lowest common denominator so far as the recognition of the dissolution of marriage was concerned. Has this legislative experience a lesson to offer to the judge when facing similar problems? If he takes the view that the more comprehensive a rule of law is the more abstract and liberal it must be, he will succeed in recognizing in a practical sense the basic principle of necessity.

These different levels of legal development require not only a more flexible approach to the questions of law and jurisdiction such as we see in *Har-Shefi's* case. They might well be assisted by the establishment of mixed courts within a federation, as was suggested in the case of Nigeria, or even on the international level by the assumption of jurisdiction in difficult problems of this kind by the International Court of Justice. There is a great need for information and thought on all sides and for the development of a body of principles of private international law at a sufficiently high level of abstraction to enable it to apply to all legal systems in very different stages of evolution. It is not only necessary to reconsider the systems of private international law of western Europe and of the United States from the viewpoint of their suitability and adequacy to take account of less developed legal systems; it is necessary also to look at the developed systems of private international law from the standpoint of these underdeveloped systems and to ask whether something more suitable could not be devised for their particular needs. It may be

<sup>1</sup> *Actes et documents de la onzième session*, vol. 2, pp. 197-8.

<sup>2</sup> *Quazi v. Quazi*, [1980] A.C. 744, and the writer's Note in *Law Quarterly Review*, 96 (1980), p. 168 and 97 (1981), p. 222.

necessary, for example, to dispense with such fundamental concepts of familiar systems of private international law as the personal law, the concept of property or of contract, the identification of tort and crime, and to recognize the existence of legal institutions as unfamiliar as those the writer has mentioned. Under these circumstances one might fairly ask, how widely should private international law apply? The answer to this question is the same as the answer to the general question of the basis of law, and that is necessity, or the need to have an obligatory pattern of behaviour between human beings who wish to associate or transact business. Private international law should apply wherever the need for it arises. Admittedly some primitive societies are living in isolation, but in so far as they have a recognizable legal system and enter into transactions to which rules of private international law are generally relevant, the principle should apply so far as it realistically can. There are naturally limits to the possibility of applying a horizontally constructed system to a vertical situation. The principle of reciprocity, for example, sacred to some civil law systems, could not be expected to operate automatically between systems at different stages of development. But if reciprocal treatment were to be excluded by the limitations of an undeveloped system, compensation might be found at least in the equally inevitable exclusion of the sophisticated doctrine of *renvoi*.

It may be thought that considerations of this kind might raise delicate political problems of resentment of certain societies or countries or communities at being treated as underdeveloped. The answer to this possible objection is that the distinction being drawn has no political content or quality whatever, and there is no reflection on any country as being more or less developed than any other. We are dealing with a situation of fact, scientific and historical, and we are seeking methods of ensuring the fullest possible recognition of legal systems at every stage of development. It is hoped that principles may be established and methods devised by which those systems that have not yet reached full maturity may be encouraged and associated to play a part appropriate to their stage of development in the operation of private international law.

The achievement of effective equality among all world systems of law for the purpose of private international law is unlikely to receive very much political support on either the national or the international level. One may perhaps look for action through inter-governmental organizations and one may justifiably hope for support from the United Nations, U.N.E.S.C.O., the Council of Europe, the Hague Conference of Private International Law and the European Economic Community. Throughout its history private international law has been far more independent of political considerations than has public international law and perhaps the greatest hope for the implementation of this new factor lies with the traditional source of authority in the field, namely, the jurists. Thus one would look to international societies: the Institute of International Law,



the International Law Association and the British Institute of International and Comparative Law, to name only some of the outstanding ones. One would look to juristic writings, to encyclopaedic works such as the *International Encyclopaedia of Comparative Law*, the *Recueil des cours de l'Académie de la Haye*, the *British Year Book of International Law*, to reviews, newspapers and other forms of publicity. One might see possibilities of development in conferences sponsored by international governmental organizations or such important and relevant bodies as the Commonwealth Secretariat. Finally, there remains the work of the individual scholar pursuing research under the auspices of some institution or foundation,<sup>1</sup> a method the writer gratefully acknowledges in the preparation of the present study.<sup>2</sup>

<sup>1</sup> 'Research and Prospects in Private International Law', in *Legal Science Today* (Uppsala, 1978), pp. 48-59.

<sup>2</sup> Part of research conducted as Leverhulme Research Fellow, 1976-8.

# NOTES

## ENGLISH INTERNATIONAL LEGAL DOCTRINE IN SOVIET TRANSLATIONS\*

By W. E. BUTLER<sup>1</sup>

Although the distinctiveness of the English approach to international law seems not to be widely doubted by international lawyers in this country, there is an extraordinarily broad range of views as to what makes it distinctive and why, and what significance should be attributed to such distinctiveness as may exist.

In the inter-war era G. Kaeckenbeeck,<sup>2</sup> John Fischer Williams,<sup>3</sup> Pearce Higgins<sup>4</sup> and others called attention to what they regarded as differences between 'Anglo-American and continental schools' of international law. Sir Frederick Pollock even wondered whether the Americans were not closer to the continental school.<sup>5</sup> Sir Hersch Lauterpacht, on the other hand, was disposed to dismiss these alleged fundamental differences as inconsequential, exaggerated or obsolete.<sup>6</sup> In the eighth edition of Oppenheim, edited by Lauterpacht, it was said:

However, there are in fact at present no such divergencies, either in the law of peace or of war. With regard to supposed differences in basic notions and methods of approach resulting from divergencies in municipal systems, international practice has, in the few relevant cases, resulted in an assimilation and mutual approximation of apparently opposed conceptions.<sup>7</sup>

Most now demur from this judgment. D. H. N. Johnson was careful to distinguish the English tradition in international law from that of Scotland, as well as from America and elsewhere.<sup>8</sup> Rosalyn Higgins has called attention to '... two profoundly differing views on the nature of international law and the role of international courts ... the majority of British international lawyers represent one of those views, whereas the majority of American international lawyers represent

\* © Professor W. E. Butler, 1981.

<sup>1</sup> Professor of Comparative Law in the University of London.

<sup>2</sup> G. Kaeckenbeeck, 'Divergencies Between British and Other Views on International Law', *Transactions of the Grotius Society*, 4 (1918), pp. 213-52.

<sup>3</sup> J. F. Williams, *Chapters on Current International Law and the League of Nations* (1929), p. 58.

<sup>4</sup> P. Higgins, *International Law and Relations* (1928), pp. 30-1.

<sup>5</sup> F. Pollock, 'The Lawyer as a Citizen of the World', *Law Quarterly Review*, 48 (1932), pp. 40-1.

<sup>6</sup> H. Lauterpacht, 'The So-Called Anglo-American and Continental Schools of Thought in International Law', this *Year Book*, 12 (1931), p. 31.

<sup>7</sup> L. Oppenheim, *International Law: A Treatise*, vol. 1 (8th edn. H. Lauterpacht, 1955), p. 54.

<sup>8</sup> D. H. N. Johnson, 'The English Tradition in International Law', *International and Comparative Law Quarterly*, 11 (1962), p. 418. Also see D. M. Johnston, 'The Scottish Tradition in International Law', *Canadian Yearbook of International Law* (in press).

the other . . .'.<sup>1</sup> Ian Brownlie has remarked on the 'parochialism' and 'insularity' still evident in the narrow range of municipal legislation and State practice examined by many British textbooks on international law.<sup>2</sup> Philip Allott distinguishes the styles of discourse in English international legal doctrine from others.<sup>3</sup> The method of teaching international law in England is believed to be a factor,<sup>4</sup> and Foreign and Commonwealth Office legal staff have commented on how the English concept of international law *qua* law influences their role as legal advisers.<sup>5</sup>

These are perceptions from the inside, so to speak, and it is noteworthy that modern self-perceptions tend to distinguish the British both from international lawyers of other families of legal systems and from other common law jurisdictions. Another perspective of value and relevance in this connection is the perception of English international legal doctrine by Soviet international lawyers, who profess to be a part of the same international legal order but of a profoundly different international legal tradition. It is a perception equally of interest in its own right, for it too undergoes the mutations of passing generations, of domestic and foreign policy, and of attitudes toward international law.<sup>6</sup>

The translation into the Russian language of a fundamental work by an English international lawyer is an event of considerable consequence. For generations of law students and international lawyers, such translations become the principal vehicle for comprehending the approach to international law of another country or culture or for introducing an alternative school of thought; and in the case of the Soviet Union, where foreign exchange limitations have precluded the importation of foreign legal materials on a large scale for general sale, the issuance of a Russian edition exposes the work to a vast new audience. In all, five English works have become accessible to a Russian readership via translation: the sixth edition of Oppenheim;<sup>7</sup> the second edition of Brownlie;<sup>8</sup> the second and sixth editions of Higgins and Colombos;<sup>9</sup> the fourth edition of Satow;<sup>10</sup> and the first edition of

<sup>1</sup> R. Higgins, 'Policy Considerations and the International Judicial Process', *International and Comparative Law Quarterly*, 17 (1968), p. 58.

<sup>2</sup> I. Brownlie, 'The Teaching of International Law', *Georgia Journal of International and Comparative Law*, 2 (1972), pp. 97-8 (Supp.).

<sup>3</sup> P. Allott, 'Language, Method and the Nature of International Law', this *Year Book*, 45 (1971), pp. 79-135.

<sup>4</sup> K. R. Simmonds, loc. cit. above (n. 2), pp. 91-5.

<sup>5</sup> See remarks by Joyce Gutteridge and H. Darwin, loc. cit. above (n. 2), pp. 71-5, 85-90.

<sup>6</sup> See W. E. Butler, 'Some Reflections on the Periodizations of Soviet Approaches to International Law', in D. D. Barry, W. E. Butler and G. Ginsburgs (eds.), *Contemporary Soviet Law* (1974), pp. 226-35.

<sup>7</sup> L. Oppenheim, *Mezhdunarodnoe pravo*, translated from the sixth English edition edited by H. Lauterpacht. Transl. by Ia. N. Retsker and A. A. Santalov. Volume 1 edited with a Preface by S. B. Krylov; volume 2 edited with a Preface by S. A. Golunskii (Moscow, 1948-50). 2 vols. in 4.

<sup>8</sup> I. Brownlie, *Mezhdunarodnoe pravo (v dvukh knigakh)*, translated from the second English edition by S. N. Adrianov. Edited with an introductory article by G. I. Tunkin (Moscow, 1977). 2 vols.

<sup>9</sup> P. Higgins and C. J. Colombos, *Mezhdunarodnoe morskoe pravo*, translated from the second revised edition by V. V. Zaitseva and N. I. Kuz'minskii. Edited with a Preface by S. B. Krylov (Moscow, 1953). C. J. Colombos, *Mezhdunarodnoe morskoe pravo*, translated from the sixth revised edition by V. V. Zaitseva and N. I. Kuz'minskii. Edited with an introductory article by A. K. Zhudro and M. I. Lazarev. Notes by V. A. Kiselev and P. V. Savas'kov (Moscow, 1975). Sixth edition reviewed in this *Year Book*, 48 (1978), pp. 414-16.

<sup>10</sup> E. Satow, *Rukovodstvo po diplomaticheskoi praktike*, translated from the fourth English edition by S. A. Panafidin and F. A. Kublitskii. Edited by F. F. Molochkov (Moscow, 1961). There evidently also was a Russian translation of the third edition edited with a Preface by A. Troianovskii. This may have been issued *na pravakh rukopisi* for use by trainees in the diplomatic corps.



Shawcross and Beaumont.<sup>1</sup> Each contains an introductory article prepared by a Soviet specialist to place the work in a larger context and in many cases to provide orientation for the reader about Soviet views on certain matters discussed in the work.<sup>2</sup>

The introductory article and in many instances also copious annotations to the text provided by the Soviet editor or translator make the Soviet translation a substantive work in its own right, offering more than a linguistic glimpse of how the English international lawyer and his doctrinal utterances are absorbed or interpreted by another legal culture. The translations of Oppenheim-Lauterpacht and Brownlie are particularly illuminating in this regard.

### *The English international lawyer*

The Russian translation of Oppenheim-Lauterpacht in all likelihood originated in the outward-looking era of wartime co-operation among the Allied Powers. The Soviet syllabus on public international law was substantially reworked from 1938 onwards.<sup>3</sup> Several draft versions of a basic Soviet international law textbook finally came to fruition in the form of a published version issued in 1947.<sup>4</sup> An enlarged Soviet role in the world community in the post-war era was expressly mentioned by Professor S. B. Krylov, in his introductory article to volume I (part 1), as a reason for preparing a Russian edition of Oppenheim-Lauterpacht; the book was, however, not selected merely as a leading English work on the subject but rather as being among '... the best known works of the bourgeois science of international law'.

The brief biographical sketch of Oppenheim mentions his early academic career in Germany and Switzerland, his move to England in 1908, and his principal monographs. Krylov noted that even while in England Oppenheim continued to collaborate with continental international lawyers through his editorial post on the *Zeitschrift für Völkerrecht* and other publications. Oppenheim's treatise is characterized by Krylov as probably the most popular in 'bourgeois jurisprudence' and as having 'serious merits': the latter included the 'expansive and satisfactorily set forth legal material (international treaties, conventions, etc.) and international legal practice used by the author ...' and the attempt in the book to synthesize 'individual national schools of international law, chiefly the English and the German'. While Oppenheim's effort to develop a 'universal international law' did not, in Krylov's view, succeed, it was said to be a very different approach from that pursued by Charles Cheney Hyde, whose

<sup>1</sup> C. Shawcross and W. Beaumont, *Vozdushnoe pravo*, abridged translation from the first English edition. Preface by S. B. Krylov and A. K. Kislov (Moscow, 1957).

<sup>2</sup> Such introductions are required by a decree of the Communist Party: see the writer's Translation Note to G. I. Tunkin, *Theory of International Law* (1974), p. xxiii.

<sup>3</sup> Soviet syllabi on public international law are of considerable interest for students of international legal history. The texts of several of these scarce and elusive documents are now available in translation. See W. E. Butler, 'On the Origins of International Legal Education in the Soviet Union: The Kravchenko Syllabus', *Legal History Review*, 43 (1975), pp. 297-305; id., 'International Legal Education of the "Transition Period"', *From the New Economic Policy to the Building of Socialism*, *Soviet Union*, 2 (1975), pp. 162-70; id., 'Soviet International Legal Education: The Pashukanis Syllabus', *Review of Socialist Law*, 2 (1976), pp. 79-102; id., 'Soviet Syllabi on Public International Law', *Soviet Union*, 3 (1976), pp. 127-30.

<sup>4</sup> V. N. Durdenevskii and S. B. Krylov (eds.), *Mezhdunarodnoe pravo* (1947). For an account of the allocation of responsibilities for the preparation of law textbooks, including the above, see B. Osherovich and B. Utevkii, *Dvadsat' let vsesoiuznogo instituta iuridicheskikh nauk* (1946).

exposition of international law (also translated into Russian) Krylov classified as a kind of 'particular international law'.<sup>1</sup>

Oppenheim himself was regarded by Krylov as a positivist in the fullest tradition of the nineteenth century. His work was based on 'positivist legal material' reflecting 'all the features and properties of the bourgeois legal worldview, formalism and dogmatism, narrowness of vision, and a complete inability or direct lack of desire to comprehend those social and political relations which condition a particular legal institute'. While Oppenheim sometimes endeavoured 'to go beyond the limits of positive law material and comprehend in the bases of law in general and of international law in particular, his exposition is characterised by extreme feebleness and even within bourgeois jurisprudence itself seems old-fashioned'.

Sir Hersch Lauterpacht, as co-author of the fifth and sixth editions, was believed by Krylov to have 'disadvantageously changed the general character' of Oppenheim's work despite the undoubted usefulness of the factual material, bibliographic data and extensive Anglo-American judicial practice which he incorporated into the study. Oppenheim, said Krylov, wrote 'in serene tones' and 'sought to be objective', even though he could not overcome the limitations of his 'bourgeois world outlook'. Lauterpacht was a 'man of another generation' imbued with the spirit of 'modern British imperialism'. Krylov felt in some measure that his revisions, including the introduction of 'natural law elements' into the exposition, had diminished the 'scientific value' of the work.

Two decades later the second edition of Ian Brownlie's *Principles of International Law* appeared in a Russian translation, introduced by G. I. Tunkin as 'one of the most extensively cited books in world international legal literature'. Whereas Krylov placed Lauterpacht's edition of Oppenheim in the framework of 'bourgeois international legal doctrine', having regard to the continental origins and links of each author, Tunkin discussed Brownlie's work in the context of English doctrine. Brownlie's book, Tunkin wrote:

... stands out against the background of the most recent English literature on international law, the dominant position in which was undoubtedly occupied in recent years by Professor Georg Schwarzenberger of the University of London and the former Director General of the International Labour Organisation, Wilfred Jenks. They both are among the most productive international lawyers. But neither Schwarzenberger nor, to a lesser degree, Jenks represent the English doctrine of international law, which finds expression in the works of scholars enjoying acknowledged international authority, such as L. Oppenheim, H. Lauterpacht, Lord McNair, and others (pp. 6-7).

Schwarzenberger, Tunkin said, was educated in Germany and escaped to England after Hitler came to power, where he found a 'second Motherland'. But in contrast to his well known predecessors, Oppenheim and Lauterpacht, immigrants from Austria, he did not assimilate and did not become a representative of the English doctrine of international law. Schwarzenberger stands by himself, being a representative of the so-called realist orientation in the theory of international law and international relations. The flourishing and decline of this orientation, whose roots derive from the German doctrine of *Machtpolitik*, took place on American soil. 'The 'realist' orientation, being a theoretical reflection and justification of the policy 'from a position of power' and 'cold war', should inevitably share the fate of this policy.

<sup>1</sup> C. C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (1946); Russian edition: *Mezhdunarodnoe pravo, ego ponimanie i primenenie Soedinennymi Shtatami Ameriki*, translated from the American edition by I. S. Shokhor (Moscow, 1950-4). 6 vols.

Jenks is described by Tunkin as one of the most productive and interesting Western authors. His works, for the most part, 'bear the stamp of the English doctrine of international law under whose influence his views were shaped, but he was too "internationalist" for it. His concept of a "common law of mankind", which he conceived as a synthesis of different existing national legal systems, is alien to the English doctrine.'

Brownlie's work, in contrast, Tunkin found to be in the mainstream of English international legal doctrine, 'for which, in particular, conservatism, an approach to international law from the position of Anglo-American common law, and a detailed analysis of international and national, principally Anglo-American, practice in the realm of international law are characteristic'. In pointing to the 'conservatism' of English international legal doctrine, Tunkin noted that such conservatism is peculiar to all of the basic orientations of bourgeois international legal doctrine. 'Despite', he says, 'the existence of certain progressive trends, the bourgeois science of international law as a whole lags behind the development of events and does not reflect many essential changes which have occurred or are occurring', not to mention that it has failed to notice the 'profound transformation of the general character of international law and its essence'. Brownlie's book, Tunkin believed, was an attempt to go beyond the limits of the traditional English doctrine of international law, to 'come closer to modern realities, and think about them'.

The Russian translations of the second and sixth editions of Higgins and Colombos display the same disposition in modern times to distinguish between the 'bourgeois' and the more specifically 'English' approach to international legal doctrine. In his introduction to the Russian translation of the second edition Krylov praised the brevity, compactness and rich factual material of Higgins-Colombos, noting that the book was based primarily on 'Anglo-American material'. The authors were described as 'English international lawyers' who combined academic work in universities with private practice and consulting with various governmental bodies. To A. K. Zhudro and M. I. Lazarev, who introduced the Russian version of the sixth edition, it seemed that Colombos had written 'in the classical tradition of bourgeois international lawyers'. He was a scholar and practitioner of a positivist orientation; indeed, his positivism was regarded as the 'strong aspect of the book'. In particular Colombos was said to display a 'splendid grasp of the art of legal analysis of international legal norms and his work is built on such analysis'.

### *Substantive positions in English international legal doctrine*

As we have seen, it is the practice of the Soviet Union to accompany translations of social science materials with substantive commentary and annotations to guide the reader. Commentary may take the form of an introductory article, footnotes interspersed where appropriate in the text or a section of editorial annotations. Observations of this nature are featured in all of the Russian editions of English writings on international law, and in many instances they offer new or even unique insight into Soviet attitudes or positions on certain matters.

*Oppenheim, edited by Lauterpacht.* Data of this character is supplied most extensively in the translation of Oppenheim. In addition to introductory articles by S. B. Krylov and S. A. Golunskii, nine individual essays by Soviet jurists are interpolated, principally in that portion of the work dealing with the laws of



war.<sup>1</sup> The substance and tone of the annotations reflects in some measure, to be sure, the era in which the materials were produced. Those emanating in the 1970s are in general more sophisticated, polished and perceptive, less didactic and polemical than those originating in the period of sharp political confrontation in the early 1950s.

In his introductory article Krylov took issue with Oppenheim's notion of international law regulating relations among 'civilized nations' and expressed wonder at Lauterpacht's failure to modify the formulation. Neither was Krylov prepared to accept Oppenheim's view that international law did not exist in Antiquity and the early Middle Ages ('here Oppenheim's work stands below the level of even bourgeois science'). The constitutive theory of recognition of States was labelled 'reactionary' for favouring the system of established States at the expense of newly formed entities. It is doubtful, however, whether even Soviet doctrine today would accept Krylov's assertion that 'when entering the international community, a state thereby recognises existing norms of international law, but it is not obliged to recognise all existing norms of international law without exception. At the same time, it may advance its own new principles of international law' (p. 18).

Lauterpacht's emendations to the book are dealt with separately. Many of these, in Krylov's view, originated in Lauterpacht's natural law orientation. Most of the rest concerned international legal developments of the wartime and early post-war era, and here, Krylov said, Lauterpacht was 'outspokenly an apologist of Anglo-American imperialism'. The examples of the latter which Krylov chose all appertained to his own area of expertise, the United Nations. Lauterpacht was faulted for his failure to emphasize the origins of the United Nations in Allied co-operation, to support unequivocally the right of veto in the Security Council and to see the differences between the trusteeship system of the United Nations and the mandate system of the League of Nations. 'Between the lines' he was believed to be a proponent of world government.

The second volume of Oppenheim-Lauterpacht was introduced by S. A. Golunskii, who enjoyed a brief period as a member of the International Court of Justice. All of the nine essays contributed by Soviet jurists appear in this volume, and the introductory critique is substantially longer than that for the first volume. Most of the Introduction is concerned with broad issues of the peaceful settlement of disputes and the use or threat of force in international relations. Exception is taken to Oppenheim's characterization of certain 'coercive means' of settling international disputes as 'peaceful, although not friendly', especially reprisals and pacific blockade. With regard to the laws of war, Golunskii claims that the authors wholly overlook the true socio-economic and political origins of war, give insufficient attention to the actual application of the relevant international conventions, and ignore certain recent practices regarding the formal declaration of war and others.

*Brownlie.* Although Brownlie's book, in Tunkin's view, was more attuned to

<sup>1</sup> Five are contributed by K. M. Simis: 'War in the Realisation of the United Nations Charter'; 'The Peaceful Settlement of Disputes According to the United Nations Charter'; 'Arbitration under the 1947 Peace Treaties'; 'The International Court'; and 'On the Status of the Question of Limitations of Armaments after the Second World War'. A. N. Trainin contributed 'Aggressive War—An International Crime'; L. A. Modzhorian, 'Partisan Detachments and the Armed Involvement of the Masses in the Second World War'; D. B. Levin, 'Violation of the Laws and Customs of Land Warfare During the Second World War'; I. S. Pereterskii and M. M. Boguslavskii, 'The 1947 Peace Treaties'.

modern realities, there are a number of points he singled out for comment or criticism. Thus, 'unlike the majority of western international lawyers', Brownlie believed that the principle of self-determination of peoples was 'one of the basic principles of contemporary international law'. Brownlie's view that in the transfer and acquisition of territory both the principle of self-determination and the principle of the prohibition of the threat or use of force must be observed was singled out for praise, although 'regrettably the author did not develop this thesis'. Moreover, he was said to treat many aspects of territorial sovereignty without taking into account the principle of self-determination, giving the impression that vassalage, suzerainty and protectorates were institutions of modern international law.

Brownlie's treatment of the principle of the prohibition of the use and threat of force was commented on in some detail by Tunkin. In general Tunkin endorsed Brownlie's view that this principle is *jus cogens*, and that modern international law prohibits conquest. But in Tunkin's view this 'generally correct position' required clarification, for under the 1970 Declaration on the Principles of International Law force may be legally used in accordance with the United Nations Charter. 'The thesis that any change of state territory effectuated with the aid of force is contrary to international law is imprecise and, in essence, untrue.' And, Tunkin added, it is not surprising that 'West German revanchists' are using this thesis to obtain a revision of frontiers established after the Second World War. Brownlie was correct, in Tunkin's view, to consider the occupation of Germany by the Allies to be a concomitant of State responsibility for Germany's aggression instead of the 'right of the victor', but Brownlie failed to take into account that modern international law 'allows the tearing away of the territory of a state with the aid of the lawful use of force as a sanction for aggressive war with a view to preventing aggression in the future'.

The second difficulty Tunkin had with Brownlie's exposition in this connection was with the treaty of cession, where again Brownlie failed to take account of aggressive war. The validity of a peace treaty concluded with an aggressor State which deprived the latter of some of its territory should be measured not only by the law of treaties, said Tunkin, but also by the law of State responsibility. And, moreover, there is also a 'new phenomenon' in international law which allows an aggressor State to be punished by taking away territory even without concluding a peace treaty or securing the formal consent of the aggressor State.

Tunkin also felt that certain very important changes in international law had not been dealt with adequately, especially with respect to State responsibility. It was not that Brownlie had, like 'many other western authors', omitted to take notice of important new phenomena in this branch of international law: rather Brownlie had not given them their due, unveiled their significance and analysed these new developments and the consequences following from them. In the instance of the *South-West Africa* cases in the International Court of Justice, Brownlie's criticism of the Court was deemed to be too general. As a 'jurist of the English school', he exaggerated the significance of judgments and advisory opinions of the I.C.J. and arbitral awards. Although his approach was said to be more realistic than that of Lauterpacht, Brownlie's exposition of the state of the law regarding the effective occupation of territory was singled out as being misleading because it relied so heavily on judicial decisions and arbitral awards.

Brownlie's view that consensus is the basis for the creation of norms of

international law, that in each individual instance the existence of a norm is to be proved by the existence of consent among States in regard to the particular norms or practice, and that the existence of customary norms ultimately depends upon the consent of States, meant that 'in essence Brownlie adheres to the theory of agreement as the basis of the creation of norms of international law, which is, in our view, in comparison with other bourgeois theories of the source of international law the most progressive and the closest to reality'. On the other hand, with respect to the 'co-relation of treaty and custom', Brownlie adhered to the 'obsolete conception according to which international custom continues to be a basic source of international law and the sole source of general international law', a view which Tunkin observed already has been rejected by the greatest bourgeois international lawyers (C. de Visscher, H. Lauterpacht, C. Rousseau, A. Verdross and W. Friedmann).

As regards norm-formation in international law, Brownlie was said to adhere to the diffuse concept widely disseminated in both English and American international legal literature which, in accordance with the traditions of these countries' municipal law, leaves the selection of sources of law to a significant extent to the discretion of the agencies which apply the law, an approach which is not always satisfactory. But Brownlie's rejection of the monist theory of the primacy of international law was warmly commended.

Brownlie's views on international legal personality are summarized in some detail without comment. However, his notion of 'legal constructions' to project the continuity of a State's existence leads, when combined with 'some obsolete concepts', to the 'absurd conclusion', for example, that a peace treaty with Germany would require the participation of three German States, the Federal and the Democratic republics and Germany prior to 1945. Tunkin considered the latter to have ceased to exist both factually and legally. Brownlie's notion of a 'protected status' was singled out as an interesting concept.

As regards recognition, Brownlie's adherence to the declaratory theory was noted, but his treatment of the duty to recognize new States did not, in Tunkin's opinion, fully reflect the modern state of the law. While Brownlie was correct in saying that a duty exists to respect the rights of a new State arising from basic principles of international law, the duty further arises from these general principles, observed Tunkin, completely to recognize a new State in specific instances, such as 'when a state was formed by the peoples of a colonial country or any other dependent territory exercising their right to self-determination'.

In conclusion, Tunkin turned to a more general issue, the functioning of international law and its role in international relations.

Bourgeois, and perhaps especially the English doctrine of international law, treat the question of the operation of international law chiefly on the plane of its application by international courts and arbitral tribunals. Under this approach, international law is considered principally as merely a means for the settlement of international disputes . . . This traditional viewpoint also is not alien to Brownlie's work.

The difficulty is, said Tunkin, that such a concept 'does not reflect the real role of international law in international life'. In actuality this concept 'touches upon merely an insignificant sphere of the functioning of international law. The international legal system, including all international legal phenomena, of which international law is the principal component, functions constantly as part of a broader international system that also functions without interruption. In this



process the functioning of international law fulfils a stabilising and creative function, a small part of which is', using Lauterpacht's terminology, 'the judicial function of international law'.

*Colombos.* Lazarev and Zhudro, the editors of the Russian translation of the sixth edition of Colombos, devoted a major share of their introductory remarks to the growth of the Soviet Union as a maritime power and to the development of Soviet attitudes toward the law of the sea following the First and Second Geneva Conferences on the Law of the Sea. Most critical commentary on matters discussed by Colombos was relegated to individual asterisked annotations. As a general matter, however, the editors felt that on several occasions Colombos

... strongly exaggerates, and often simply distorts the role and place of the British Navy in world history, whitewashes its unseemly actions, and ignores its function as a direct instrument of colonialism and imperialism. In a number of instances, when speaking of the British Navy, he slides into being an outright apologist. A traditional class and frequently a great-power national narrow-mindedness of the author is characteristic of the book as a whole (p. 11).

The asterisked annotations were prepared by V. A. Kiselev and P. V. Savas'kov. They rejected Colombos's view that customary norms of international law play the principal role in developing international law: 'This concept at present is clearly obsolete and does not reflect reality'. The international treaty '... has replaced custom as the basic source of international law'. Colombos 'and a number of other western authors strongly exaggerate the significance of the activity of English and American jurists, particularly judges, in the domain of forming norms of international law'. Colombos also is taken to task for his treatment of 'absolute or exclusive' sovereignty. Absolute sovereignty has 'nothing in common with the concept of sovereignty in modern international law', they suggest; 'a state has the right to act independently only to the extent that its actions do not violate the sovereignty (territorial supremacy and independence in international relations) of other states'. The author's arguments on behalf of the three-mile territorial sea were regarded as only of 'historical interest'. The right of innocent passage for warships provided for in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone 'is not generally recognised'. Exception was taken to the author's treatment of the Suez Canal, and he was criticized for failing to take account of changes in international law concerning enforcement measures in peacetime. Pacific blockade was singled out as one such measure 'prohibited by contemporary international law', specific reference being made to Cuba.

*Satow.* The fourth English edition of Satow was prefaced by a brief unsigned statement 'From the Publisher', probably prepared by F. F. Molochkov, recounting the printing history of earlier editions and changes introduced in each. The principal shortcoming of the manual was said to be the 'complete lack of a description of the new forms and methods of international relations which entered international practice with the commencement of Soviet diplomacy...'. It was also felt that more attention might have been given to describing the organizational structure of foreign offices and less to the ceremonial niceties attendant upon the reception of envoys.

### *Perspectives*

While there are certain common elements in Soviet and English perceptions of

the English international lawyer and his 'style', some of the differences in the perceptions are quite striking. Two major characterizations of the English international lawyer expressed by Soviet jurists most certainly are not shared by the English international lawyer himself: his alleged class outlook held in common with other 'bourgeois' jurists and his alleged bias in favour of British national interests. Whereas the English style of doctrinal exposition seems detached, precise or even uninvolved in its Austinian and earlier Romanist tradition, in Soviet eyes it is believed to be partisan and deeply enmeshed in modern international politics. Emphasis upon the 'bourgeois' element in English international legal doctrine has led, it would seem, to Soviet international lawyers overlooking many of the distinctive features which some believe more or less unique to the English milieu. The 'exaggerated regard' for judicial decisions and arbitral awards in English international legal doctrine still appears to be an 'Anglo-American common law' phenomenon in Soviet eyes, although American views are now widely recognized to be otherwise, and almost no attention is given in Soviet commentary to respective Anglo-American views on the very nature of international law. The style of exposition and analytical skills displayed in English international legal doctrine are admired and praised by Soviet international lawyers, but the extent to which this is a product of the English milieu—language, culture, legal education, style of legal discourse, temperament or whatever—is not explored. None the less, it is of considerable interest to note where, as measured by these materials, the *locus* of the 'English school' has moved. To Krylov, writing thirty years ago, Lauterpacht and Oppenheim represented continental hybrids within the 'English school'; Tunkin, on the other hand, regarded both as part of the mainstream of the classical English tradition, to which Schwarzenberger and Jenks were exceptions.

# DELIMITATION OF MARITIME ZONES— RECENT COMMONWEALTH DECISIONS\*

By GEOFFREY MARSTON<sup>1</sup>

During recent years most coastal States have taken steps to consolidate and extend their maritime jurisdiction. In many cases the step has involved the creation of zones of uniform breadth measured from a baseline. These zones include those of plenary jurisdiction, for example territorial sea and exclusive economic zones, and those of limited jurisdiction, for example fishery zones, anti-pollution zones and customs zones. As one of the results of creating such zones is almost always the extension of the State's criminal jurisdiction over all persons and vessels found therein, it is not surprising that challenges have been made in the courts to their validity. This note will review the judicial practice of three States, Australia, the Bahamas and Canada.

## 1. *Australia*

The Fisheries Act 1952 of the Commonwealth of Australia provided for the regulation of fishing in 'proclaimed waters'. These were defined as 'Australian waters specified by Proclamation'. 'Australian waters' in their turn were defined as 'Australian waters beyond territorial limits'. The reason for such a restriction was that the Australian Constitution gives power to the Commonwealth Parliament to make laws with respect to fisheries only 'in Australian waters beyond territorial limits'. Pursuant to the Act, the Governor-General of Australia by proclamations in 1954 and 1956 designated an area extending from the shore outwards as far as 200 miles but excluding 'waters that are within the territorial limits of a State or a Territory of the Commonwealth'. A 1967 amendment to the Fisheries Act provided for a 'declared fishing zone' defined as 'the waters adjacent to Australia and having as their inner limits the baselines by reference to which the territorial limits of Australia are defined for the purposes of international law and as their outer limits lines seaward from those inner limits every point on each of which is distant twelve international miles from the point on one of those baselines that is nearest to the first-mentioned point . . . but does not include any waters that are not proclaimed waters.' In *Bonser v. La Macchia*<sup>2</sup> a majority of the High Court of Australia considered that the Commonwealth Parliament had no power to pass laws with respect to fisheries within three nautical miles of the shore of Australia. It followed, therefore, that the declared fishing zone could not include the inner three miles of territorial sea.

In *Chen Yin Ten v. Little*<sup>3</sup> the captain of a Taiwanese fishing boat was convicted by a magistrate in Western Australia of an offence under the above Fisheries Act, which provided that a person 'shall not, in the declared fishing zone, have in his possession or in his charge a foreign boat equipped with nets or other equipment

\* © Dr. Geoffrey Marston, 1981.

<sup>1</sup> LL.M., Ph.D. (Lond.); Lecturer in Law, University of Cambridge; Fellow of Sidney Sussex College.

<sup>2</sup> (1969) 122 C.L.R. 177.

<sup>3</sup> (1976) 11 Aust. L.R. 353.



for taking, catching or capturing fish'. On appeal to the Supreme Court of Western Australia the accused argued that the zone had not been validly created. He submitted that before there could be a valid zone there must be 'baselines by reference to which the territorial limits of Australia are defined for the purposes of international law'. Without such baselines there could be no inner limits and hence no outer limits. The location of the nine-mile zone would therefore be indeterminable. He then referred to Article 3 of the Convention on the Territorial Sea and the Contiguous Zone 1958 which stated that 'the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State'. In 1958 Australia had signed this Convention which had come into force in 1964. It had been made part of Australian municipal law by the Seas and Submerged Lands Act 1973, although in the accused's submission it had sufficient effect in 1967 to govern the interpretation of the Act defining the zone. As no official charts had been issued there was no 'normal baseline' within the meaning of Article 3 and thus no 'baselines by reference to which the territorial limits of Australia are defined for the purposes of international law'.

The Supreme Court rejected the above argument. Jackson C.J. and Burt J. held that under customary international law the baseline of the territorial sea had for long been the low-water line irrespective of whether it was shown on official charts or not. When the 1967 amendment was passed, Parliament intended this baseline to apply until such time as it might be changed in accordance with international law. Jones J. added that in his opinion the concluding words of Article 3—'as marked on large-scale charts officially recognized by the coastal State'—stood, as it were, in parentheses. This would leave the rest of the provision as the operative part, confirming that the low-water line was the normal baseline of the territorial sea.

The accused had been convicted of the offence at a distance of just over ten miles from a feature called Rosily Island. He conceded that if this feature was a piece of land surrounded by water and above water at high tide it was an island and if it was an island it could be used to establish part of the baseline. His attempt to disturb the finding of fact by the magistrate that it was an island failed.

In *Li Chia Hsing v. Rankin*<sup>1</sup> the accused was charged under the same section of the Fisheries Act. The described position of the offence was 10.7 miles from the nearest point on the coastline of the Gulf of Carpentaria. The case was removed into the High Court of Australia as raising questions of the application of the Australian Constitution and the Fisheries Act of the Commonwealth Parliament. Three arguments relevant to this discussion were put forward in his defence. Firstly, it was argued that the definition of the zone was incapable of legal application since the 'inner limit' contemplated by the Act, namely the low-water line, was outside the area which could be designated 'proclaimed waters' and so fall within the zone, since the low-water line and the waters out to three miles were not 'Australian waters beyond territorial limits'. A limit, it was argued, must border that which it purports to delimit. The Court rejected this argument. Only Barwick C.J. gave any reasons. In his view, 'given a proclamation which confines itself to waters within the limits of the definition of the declared fishing zone, there is no uncertainty in the identification of the limits of the fishing zone'.

The accused's second argument was that the waters in which the offence was

<sup>1</sup> (1979) 141 C.L.R. 182.

alleged to have occurred were internal waters of the state of Queensland and so were not 'Australian waters beyond territorial limits'. Strangely, none of the members of the High Court referred to this argument. Perhaps as there was evidence that the accused might have been within the declared fishing zone it was to be left to the magistrate, to whom the case was remitted for further hearing, to determine whether the limits of Queensland extended into the Gulf of Carpentaria.

The third argument advanced by the accused was similar to that put forward in *Chen Yin Ten*, namely that the absence of official charts marking the low-water line made it impossible to define the inner, and therefore the outer, limit of the zone. This argument was equally rejected by the Court. Barwick C.J. stated that the low-water line was the baseline by reference to which the territorial limits of Australia were defined for the purposes of international law and 'that line does not depend for its existence and significance upon any chart'.

## 2. *The Bahamas*

The Fisheries Act 1969 of the Bahamas, then a British colony, created certain offences in respect of persons on board foreign fishing boats 'within the exclusive fishing zone'. This zone was defined in the Act as 'the territorial waters of the Bahama Islands together with the zone contiguous to the said waters which was proclaimed as a fisheries zone for the Bahama Islands by proclamation made by the Governor . . .'. The proclamation in question was promulgated on 26 February 1969. In part it read:

There is established for the Bahama Islands a fisheries zone contiguous to the territorial sea of the Bahama Islands.

The said fisheries zone has as its inner boundary the outer limits of the territorial sea of the Bahama Islands and as its seaward boundary a line drawn so that each point on the line is twelve nautical miles from the nearest point on the low-water line on the coast or other baselines from which the breadth of the territorial sea is measured.

The 1969 Act was repealed by the Fisheries Resources (Jurisdiction and Conservation) Act 1977 of the independent Commonwealth of the Bahamas. The 1977 Act provided for the establishment of a zone to be known as 'the exclusive fishery zone of the Bahamas'. It continued:

The outer boundary of the exclusive fishery zone is a line drawn in such a manner that each point on it is two hundred miles from the baseline from which the territorial sea is measured . . .

This definition became the subject of judicial scrutiny in *Commissioner of Police v. Banos*<sup>1</sup> in February 1979. The accused was intercepted on board a fishing vessel registered in the United States at a point four miles from an island in the Commonwealth of the Bahamas. He was charged with an offence under the 1977 Act of fishing within the exclusive fishery zone. The stipendiary magistrate held that the territorial sea of the Bahamas was a belt of three nautical miles measured from low-water mark on each island. He deduced this from section 7 of the Territorial Waters Jurisdiction Act 1878 of the United Kingdom Parliament. The alleged offence, therefore, took place on the high seas and any exercise of criminal jurisdiction thereover had to be unambiguously authorized by Act of Parliament. Turning to the definition of 'exclusive fishery zone' in the 1977 Act, the

<sup>1</sup> Unreported. The author is grateful to Mr. J. Strachan, Assistant Registrar of the Supreme Court of the Bahamas, for providing a transcript.

magistrate held that all that it had done was to define an outer limit; it had not defined an inner limit since the baseline of the territorial sea was not stated to be the inner limit but merely the line from which the outer limit could be determined. The Governor's proclamation of 1969 had clearly defined both an inner and an outer limit but this had been effectively repealed with the repeal of the 1969 Act. The Fisheries Conservation and Management Act 1976 of the United States, too, had clearly provided for the definition of an inner as well as an outer limit.

The prosecution appealed to the Supreme Court of the Bahamas. It was argued for the accused that in the absence of a clearly defined inner limit the definition was consistent equally with an artificial system of baselines joining the islands and cays so as to form an archipelago and from which the outer limit of the zone was to be measured. It was also argued that in the absence of a defined inner limit it was not clear whether the exclusive fishery zone embraced the territorial sea or whether it was contiguous to it. The location of the zone was thus uncertain.

Smith C.J. agreed with the prosecution's argument and quashed the magistrate's order. He held that it was permissible to take account of the previous state of the law, namely the 1969 Act and proclamation. He stated:

The 1977 Act has extended that area but in creating the new exclusive fishery zone it has not defined a new baseline but has extended the area from the natural existing baseline of the low water line defined for this purpose in the Proclamation. Nowhere in our law has a baseline differing from the low water line of the sea on the coast been defined or declared.

I therefore construe 'baseline' in section 5 of the 1977 Act to be the same as in the Proclamation, and hold it to be the low water line on the coast of each island or cay of the Bahamas. The Crown in the Proclamation was asserting a claim which the courts are bound to recognise. In those circumstances it was unnecessary to define the baseline afresh.

The Chief Justice found support for his view of the baseline from Article 3 of the 1958 Convention on the Territorial Sea and the Contiguous Zone, although this was not part of Bahamian municipal law in the absence of local legislation; there was a presumption, however, that local legislation did not contravene the terms of an international convention to which the Bahamas was a party. He implied, rather than expressly ruled, that the 'exclusive fishery zone' comprehended the territorial sea, which he held to be the sea within three nautical miles of low-water mark of each island or cay in the Bahamas.

### 3. *Canada*

The seasonal culling of seals on the ice floes contiguous to the coast of Labrador in Canada has resulted in frequent demonstrations. In *R. v. Davies*<sup>1</sup> a member of a conservation group was charged before a magistrate with: (i) landing a helicopter less than half a mile from a seal on the ice, (ii) operating a helicopter over seals on the ice at an altitude of less than 2,000 feet, both contrary to Seal Protection Regulations made by the Governor-General of Canada pursuant to the Canadian Fisheries Act. This Act defines 'Canadian fisheries waters' as 'all waters in the fishing zones of Canada, all waters in the territorial sea of Canada and all internal waters of Canada'. At the time the Regulations were promulgated Canada had legislated to create a fishing zone of a breadth of nine miles measured from the outer limit of a three-mile territorial sea. The Seal Protection Regulations stipulated that they were applicable in an area off the eastern coasts of Canada

<sup>1</sup> (1976-7) 14 N. & P.E.I. R. 1; Newfoundland Supreme Court and Court of Appeal.



specifically defined to the north, south and west, but lacking an easterly, i.e. seaward, limit. The alleged offences had taken place about fifty miles east of the coast of Labrador.

The accused sought in the Supreme Court of the Province of Newfoundland and Labrador to have the charges against him quashed. He argued *inter alia* that (i) the Regulations were *ultra vires* the Governor-General since the Fisheries Act did not authorize the creation of offences outside 'Canadian fisheries waters', i.e. beyond twelve miles from the baseline of the territorial sea; the Canadian Criminal Code indeed provided that 'subject to this Act and any other Act of the Parliament of Canada, no person shall be convicted in Canada for an offence committed outside of Canada'; furthermore, on the basis of statements of Cockburn C.J. and Lush J. in *R. v. Keyn*,<sup>1</sup> accepted in the Canadian case of *Gavin v. The Queen*,<sup>2</sup> the Courts themselves could not grant or receive territorial jurisdiction below low-water mark unless authorized by an Act of the Parliament of Canada. He argued (ii) that the Regulations were void for uncertainty in failing to provide an eastern boundary to the area in which they purported to apply.

In the Supreme Court, Noel J. held that on its construction the Fisheries Act applied only to Canada and Canadian fisheries waters as therein defined; there was no need, however, to stipulate an eastern boundary to the area over which the Regulations applied as this boundary by necessary implication was twelve miles. The charges against the accused were therefore quashed.

The Crown appealed to the Court of Appeal of Newfoundland which affirmed the judgment of Noel J. Furlong C.J., with whom Morgan J. agreed, held that a Regulation asserting jurisdiction beyond twelve miles was outside the regulatory power contained in the Fisheries Act; the eastern limit of the Regulations was by necessary implication twelve miles and did not require repetition. Gushue J.A. agreed in the dismissal of the appeal on the basis of *ultra vires*; his judgment suggested that he might in addition have considered the Regulations void for uncertainty. It should be noted that since the above proceedings were initiated Canada has extended its fishing zone to a distance of 200 miles from the baseline of the territorial sea.

<sup>1</sup> (1876) L.R. 2 Ex. D. 63.

<sup>2</sup> (1956) 3 D.L.R. (2d) 547.



## REVIEWS OF BOOKS

*Methods of Interpretation and Community Law.* By ANNA BREDIMAS. Amsterdam: North Holland Publishing Company, 1978. xviii + 219 pp. (including index). \$32.75.

The appearance of this monograph, which is based on the author's doctoral thesis, underlines the extent to which the literature on Community law written for the British reader (with the notable exception of Brown and Jacobs's splendid *livre de poche*) has neglected an aspect of the Court of Justice that is vital to an understanding of its politico-economic role in furthering European integration.

This is the sixth volume in the series, *European Studies in Law*, published under the auspices of the Centre of European Law at King's College, London. The author's brief is daunting: first, to explain from a comparative standpoint the general nature of the interpretative methods employed by any legal order—whether it be national, Community or international; secondly, by means of a close and detailed study of the jurisprudence of the Court of Justice, to identify the operative methods of interpretation in the development of the Community legal order.

The book throughout assumes a fairly high level of erudition on the part of the reader, in terms of both familiarity with European Community law and a knowledge of continental legal philosophy. Part I opens with a heavily philosophical treatment of the nature of legal interpretation. It suffers from indiscriminate name-counts of jurists (see pp. 7, 17 and 24) that should have been relegated to the end notes. The 'potted' accounts of their respective theories inevitably lead to obfuscation or to drastic oversimplification (see references to 'Hegelian terminology', p. 7, and to Austin, p. 11, end note 19). This part concludes with a concise, well-documented survey of the methods of treaty interpretation in international law, and offers an explanation of why these methods have been rejected as inadequate in the context of the European Community Treaties. Part II examines at length three major approaches to interpretation which can be discerned in the case-law of the European Court. As Dr. Bredimas points out, the Court itself has generally eschewed any theoretical discussion of the methods of construction used in its judgments. The first approach, labelled textual, puts the emphasis on literal, grammatical, logical and systematic techniques and flourished in the early years of the Court. Similarly, resort to the second approach, the subjective method, defined here as the 'search for the original common legislative intention . . . at the time the Treaties were concluded' (p. 54), particularly as found in *travaux préparatoires*, has declined markedly over the years. The significant factor here is the non-publication of the preparatory work of the Community Treaties. Both approaches are ill suited to the realization of European integration, which calls for a 'more dynamic approach' (p. 48). This need has been met by the functional approach, which considers the 'various political, economic and social factors that surround the functioning of the Treaties and which determine its general scope . . .' (p. 70). This method has now become the Court's 'major interpretative instrument' (p. 65). The author uses the case-law of the Court in differing sectors of Community policy as well as such general doctrines of Community law as direct effect and supremacy to illustrate the functional approach. Dr. Bredimas astutely observes (p. 89) in relation to the latter doctrine that since the Court is not yet a federal court backed up by an integrated federal power it must always calculate the risk when declaring such a far-reaching rule: hitherto, it has not been wrong in its calculations and has received the necessary political backing.

Within Part III, which is headed 'Methods according to the outcome and problems arising from the Interpretative Process', the author questions the dichotomy between



extensive and restrictive methods of interpretation of Community law frequently postulated in doctrinal discussions and convincingly argues, with reference to decided cases, that the dichotomy is better seen as one between outcomes rather than methods. The next section, which is the best of the entire book, looks at the way in which the Court has exercised a creative law-making function by filling in gaps in the Treaties, drawing for this purpose, by means of comparative law techniques, on general principles of law and national legal concepts. In this connection Dr. Bredimas scotches the oft-held view that French administrative law has provided the major source of inspiration for the Court. Public international law concepts have been used very sparingly by the Court for the reason that in the Community context they constitute 'more a disruptive than a constructive element' (p. 134).

The weakest section of the book is to be found in Part IV, which ranges from a hackneyed treatment of English methods of statutory interpretation to a limited and rather dated analysis of the problems of law and procedure that are likely to confront United Kingdom courts when using the preliminary reference procedure pursuant to Article 177 of the E.E.C. Treaty. It is not clear why the least developed, certainly in terms of this Article's integrative purpose, among the major jurisdictions of the Community's member States, should be singled out: at the very least it should have been complemented by a comparison with more developed jurisdictions.

Dr. Bredimas's verdict on the Court's contribution to European integration is favourable: though it has operated as a 'federator' rather than a 'conservator' (p. 181), it has always been conscious of the dangers in 'pressing legal integration too far ahead of political and economic integration' with the result that there has never been a case of non-compliance with a judgment of the Court (p. 145)—an assessment that may well have to be reviewed after Case 232/78—*Commission v. French Republic*.

In view of the exorbitant price of this slim volume the customer is surely entitled to a product that is well-nigh flawless. Regrettably this is not the case here. The pagination (pp. 54–71) of the reviewer's copy was badly awry; typographical errors appear at xvi and pp. 9, 14, 24, 83, 170 and 177. The author displays a predilection for mystifying words and phrases, for instance, 'teleobjective' (p. 78), 'the unity of the market, law and politics' (p. 72). The citation of the names and facts of cases follows no consistent principle; some cases are referred to in the text, others in the end notes. Similarly, facts are rarely given or if so, in inscrutable Euro-shorthand: 'the computation of the amount of the denaturing premium' (p. 128). The piling up of quotations from the Court's jurisprudence is often overdone to the point of tediousness. The statement (p. 42) attributed to Advocate-General Mayras in *Reyners* does not appear in that form in the report of the case found in either [1974] C.M.L.R. at 320 or [1974] E.C.R. at 666.

This ambitious book is only partly successful. It does, however, introduce English readers to an important body of doctrinal writing in other member States of the European Community and for this reason merits consultation by the specialist on Community law.

J. C. WOODLIFFE

*Principles of Public International Law.* By IAN BROWNLIE. 3rd edition. Oxford: Clarendon Press, 1979. xxxviii + 732 + (index) 10 pp. Hardback £17.50, paper £10.50.

The position of this textbook as one of the finest general expositions of the law of peace in the English language is now secured, and a review of the third edition must necessarily concentrate on the main areas of revision. These are three: the law of the sea, State immunity and the status of foreign investments.

The law of the sea presents any writer with a formidable problem, such is the state of flux in which the law now finds itself. Nevertheless, this textbook admirably combines a statement of the traditional law with a clear explanation of the trends of change. In dealing

with the territorial sea, it is perhaps misleading to suggest that the more detailed definition of 'innocence' to be found in Article 19 of the I.C.N.T. resulted from the insistence of the maritime powers (p. 205), for much of the new text reflects rather the concerns of the smaller, coastal States. However, it is certainly correct to suggest (pp. 214-15) that the concept of a contiguous fishery zone has now been accepted. The somewhat conservative judgment of the I.C.J. in the *Fisheries Jurisdiction* cases is noted and explained. Yet perhaps the crucial factor was not so much that the United Kingdom and Germany had not recognized the Icelandic claim to a fifty-mile zone, but rather that within that zone they had established fishing practices. Hence non-recognition by a non-fishing State would perhaps have had little effect.

The important change, of course, is the new Exclusive Economic Zone (E.E.Z.), and this rightly merits two pages. There may be a case for more extended treatment, because the rather complicated rules about coastal State jurisdiction over pollution by ships are not explained, and yet they represent a vital part of the over-all package on the E.E.Z., without which the maritime powers could not have accepted the package.

The treatment of the continental shelf is excellent. There may be point in giving rather more of the Dispositif of the 1969 Judgment in the *North Sea* cases than the first paragraph on 'natural prolongation', for the various subsidiary 'factors' are gaining in importance as the practical difficulties of the 'natural prolongation' concept become clear. The 1977 *Channel* award is explained concisely and accurately, and Professor Brownlie rightly emphasizes the subjectivity inherent in the application of equitable principles.

To criticize Article 121 (3) of the I.C.N.T. (which denies to rocks incapable of sustaining human habitation, or economic life, any continental shelf) on the ground that this is incompatible with the general practice of employing such rocks as turning-points for baselines may be to misconstrue the rule. The new rule would be no bar to such practice where the shelf appertains to a mainland: the new rule simply denies to a mere rock its own shelf.

The 'overlap' of the E.E.Z. and shelf regimes within 200 miles is a potential problem, but Professor Brownlie is correct in asserting (p. 231) that this does not necessarily entail identity of boundaries. There is yet another difference worth noting. The 'sedentary' species are a shelf, not an E.E.Z., resource, and they are therefore not subject to the E.E.Z. rules about sharing any surplus.

The next major area of the law which has required revision of the text is that dealing with sovereign immunity. The distinction between immunity (which can be waived) and non-justiciability (which goes to propriety, irrespective of waiver) is well made and important. The statutory adoption of the restrictive theory of immunity under the U.S. Foreign Sovereign Immunities Act of 1976 and the U.K. State Immunity Act of 1978 is noted, but there are features of the U.S. Act which might be worth stressing. First, although Professor Brownlie favours the test of the 'purpose' of the activity, to determine whether an act is sovereign or 'commercial', the U.S. Act takes exactly the contrary view. Hence, to take his example, buying stores for the armed forces would be commercial under U.S. law, since it is the nature of the transaction rather than its purpose which governs. Second, the power of the Department of State to 'suggest' immunity has gone: the matter is to be decided by the courts without reference to the State Department. It might also be useful to explain the special provisions of the U.K. law with regard to 'separate entities'. Moreover, the *Congreso del Partido* case merits more than a footnote (at p. 337). The view adopted by Goff J. at first instance, that even where there is no immunity because of the commercial nature of the activity, a State may still plead 'act of State', needs very careful scrutiny. It is a view so far rejected by U.S. courts and, if maintained, could diminish the effect of the new 1978 Act. It is, incidentally, a pity that the issue was not tackled in the new Act while still in the drafting stage.

The last major section to be revised is that concerning the status of foreign investments. The need for revision has arisen from the adoption by the General Assembly of the Charter of Economic Rights and Duties of States in 1974. Professor Brownlie takes the view that

the crucial provision in Article 2 (2) (c), by which an expropriating State may settle the question of compensation under its own domestic law, may be evidence of new, customary law (pp. 542-3). Even though he concedes that, as a new custom, it would not bind persistent objectors like the U.S.A., and the U.K., it is certain that this view will be regarded as controversial. The argument that it is an emergent, customary rule seems to be threefold. First, that many States regard it as such. As to this, it must be said that one needs evidence of attitudes in practice rather than in debate to support this view, and it might prove very difficult to establish such evidence of practice by the overwhelming majority of States. Second, that the language of Article 2 (2) (c) 'harks back' to paragraph 4 of the 1962 Resolution. As to this, one can only say that there is a substantial difference between the two, for the 1962 Resolution referred to compensation 'in accordance with international law'. It was this important difference which led Dupuy, as sole arbitrator in the *Texaco v. Libya* case, to distinguish the two resolutions and reject the 1974 Resolution (the Charter on Economic Rights and Duties) as evidence of customary international law. Third, that the registration of negative votes by some States is evidence of this recognition of a need to 'contract out' of a new rule. As to this, it must be said that the argument is a difficult one, for opposition to a resolution may be based upon a variety of motives, and it cannot be assumed that the motive is to avoid commitment to a rule which would otherwise be binding as a rule of customary law.

This review is sufficient testimony to the capacity of Professor Brownlie's book to identify the core issues, and to promote thought about them. Controversy is inescapable on such issues. The advantage of this book is that the reader has, at his disposal, an enormous wealth of material and reference. Moreover, he has the law expounded in a way which is not only sophisticated, for Professor Brownlie rarely expounds a rule without demonstrating its rationale and implications, but a model of clarity and balance.

D. W. BOWETT

*African Boundaries, a Legal and Diplomatic Encyclopaedia.* By IAN BROWNLIE, with the assistance of IAN R. BURNS. London: C. Hurst & Co. for the Royal Institute of International Affairs; also Berkeley and Los Angeles: University of California Press, 1979. xxxvi + 1355 pp. £60.

The purpose of this important and timely work is the systematic and convenient presentation of materials and evidences of all land boundaries—with a few exceptions to be mentioned later—on the continent of Africa. The materials and evidences are not confined to those already published or more or less easily come by. Each boundary has been made the subject of thorough and skilled research. So this book is no mere convenient assembling of materials. It is a major contribution to scholarship, to the understanding of both African boundaries and boundaries in general, and of the place and function of international law in society.

The arrangement under each boundary heading is this: 1. *General Provenance*, which briefly describes the political, diplomatic and legal context; 2. *Alignment*; 3. *Evidence*, which covers (a) *Agreements*, (b) *Legislative and administrative measures*, (c) *Other evidence*, (d) *Map evidence*; 4. *Demarcation*; 5. *Current issues*; and 6. *Bibliography*. All important texts, such as the texts of agreements, notes and memoranda, are set out in full. Each boundary alignment is illustrated by at least one sketch map, usually at the beginning of each section. Where there are important possible variations, these are described and illustrated if necessary, e.g. the five possible theses on the quadripoint issue between Botswana and Zambia.

The work is in five Parts, namely: Part I, *States of the Mediterranean Littoral*; Part II, *States of West Africa and the Western Sahara*; Part III, *The Succession States of French Equatorial Africa, with Cameroun, Equatorial Guinea and Zaïre*; Part IV, *Sudan, Ethiopia, Somalia and East Africa*; Part V, *Southern Africa, including Angola, Zambia, Malawi and Mozambique*. The only boundaries excluded, apart from all maritime boundaries, are



those between Egypt and Israel and the Gaza Strip, and those of the Spanish enclaves at Ceuta and Melilla, in Morocco. There is at the beginning of the volume a useful pull-out showing in clear diagrammatic form the political maps of Africa 1926-46, and Africa 1978, in juxtaposition.

There is an introduction of 21 pages which makes some important general points about the nature of boundaries and of the means of establishing them, and of boundary disputes. Particularly interesting—and healthy—is the author's insistence on a precise and technical definition of the concept of a dispute, and thus to exclude from it the merely unresolved, or ambiguous, or the doubts or differences that persist because they do not greatly matter, or which are not properly concerned with boundaries, and so on. He is driven to insist upon this discipline because so much of the writing upon African boundaries hitherto has been non-technical; and the 'journalist and the political scientist tend to see or to try to seek out drama and "conflict" far too readily and underrate the normal and the undramatic'.

A point that Professor Brownlie insists upon is that so many boundary disputes which the journalist or political commentator tends to describe as being to do with ideological differences, alliances, ethnic or religious affinities and the like, in fact 'arise by reason of a feeling of the governments concerned that they have a *rightful* (the non-technical term is used deliberately) claim to pursue or at least *rights* to be reserved, even if no claim is actively pursued. Moreover, and this is the nub of the matter, a proportion of disputes arise because of the *genuine* technical and historical problems relating to the alignments concerned.' Thus, for example, says the author, one commentator on the Moroccan-Algerian dispute over 1,800 kilometres of boundary relates it to this or that *political* factor, but fails to show the precise elements of confusion, and that the alignment must have presented real problems to be resolved, *whatever* the political attitudes of the governments concerned.

The above is only a taste of this measured and stimulating introduction, which is one of the best things ever written on the question of boundaries. Most such studies are written on the basis of particular boundary judgments or awards; this one is written on the basis of the boundaries of a continent, disputed or not. Of course this work is only about land boundaries. It would be interesting sometime to have Professor Brownlie's views on how all this relates if at all to maritime boundaries.

In a book of this kind, presenting a mass of different materials, very much depends upon the art of the printer and the book designer. Both have done an excellent job, making it easy and a pleasure to use.

R. Y. J.

*International Law in Comparative Perspective*. Edited by WILLIAM E. BUTLER. Alphen aan den Rijn and Germantown, Maryland: Sijthoff and Noordhoff, 1980. vii + 315 pp. (including bibliography and index). Dfl. 85.

In his introduction to this collection of essays Professor Butler observes that 'exploration of the potential uses of the comparative method in understanding the international legal order . . . continues to be an underdeveloped realm of comparative legal studies'. The materials presented in this volume are intended to be a palliative for this neglect. Some of the items have appeared in other publications and others were reports presented to the Budapest Congress of Comparative Law in 1979. Thus the book provides in accessible form what would otherwise be scattered. Moreover, a number of items now appear in translation. The seventeen essays are followed by a selective bibliography.

The entire enterprise owes a great deal to the scholarship and teaching experience of the editor. The individual essays have a wide range. Contributions include Professor von Mehren on the relevance of comparative law to the theory and practice of private international law, the editor on Anglo-American research on Soviet approaches to public international law and Nicholas Valticos on the relation of comparative law and international labour law. The principal concern is, of course, the role of 'the comparative

method' in the context of public international law and in this respect there is a degree of repetition in the succession of fairly short essays.

The studies reveal that no less than six themes are pertinent: the conception of domestic law as State practice contributing to the development of customary international law (the essay by Bothe and Ress is of particular interest here), the role of comparative law in choice of law theories, the determination of 'general principles of law', projects for the unification of private law, the different types of international law (the theme of ideological regionalism), and the filling of gaps by means of 'equity' and related practices (the essay by Professor Leslie Green).

The treatment is comprehensive and, perhaps as a paradoxical result, the reader is left with a sense of something missing. In the first place, the themes are treated as general themes and, in the case of public international law, there should have been more room for examination of specific problems of application. Secondly, the general tone is didactic and even defensive, in spite of the fact that many of the readers must already stand in the ranks of the converted, and therefore be more interested in the issues of application. These considerations lead to the relative weakness of the book in relation to public international law. Much more should have been done to place the 'comparative method' in a relation with the crucial problems of the sources of public international law, alongside an examination of positivist methods of law-finding as recently practised by tribunals and others. A further limitation is the absence of discussion of the issues of justiciability and *locus standi* in public international law and, indeed, of the general importance of public law reference and analogies: see the present writer's study in this *Year Book*, 42 (1967), pp. 123-44. This article is entirely concerned with the relevance of municipal law experience to the issue of justiciability in international relations.

The study, whatever its limitations may be, provides a prospectus and a foundation for more particular studies in the problems of application of the comparative method, for example, in the areas of human rights, nationality in public international law and concession contracts.

IAN BROWNLIE

*The New Humanitarian Law of Armed Conflict.* Edited by A. CASSESE. Naples: Editoriale Scientifica s.r.l., 1979. xxiv + 501 pp.

The essays in the present volume are the outcome of an imaginative research project conceived by Professor Cassese in 1974 and designed to present a critical appraisal of the outcome and proceedings of the Geneva Diplomatic Conference on the Reaffirmation and Development of Humanitarian Law applicable in Armed Conflicts. As is usually the case with works of this kind, the seventeen contributions (four of which are in French) vary considerably in length and quality. They include, however, a number of studies of high scholarly merit and together constitute an excellent survey of recent developments.

The scene is set by D. Schindler's opening contribution which discusses the declining importance of war as a legal concept in the period since 1945. Further background material is provided by the next essay, in which A. Eide reviews the present world military structure and the obstacles to disarmament.

On the development of the new humanitarian law of armed conflict specifically, there are major studies on wars of national liberation by J. J. A. Salmon, the protection of civilian populations by K. Obradovic and means of warfare by A. Cassese. In the last the editor's discussion of the difficulty of translating agreement on general principles into effective legal measures is particularly illuminating, as is his explanation of the further problem of extending such measures to internal conflicts. Non-international armed conflict is the main subject of two other essays, a short study by R. J. Dupuy and A. Leonetti and a second contribution by A. Eide, in which the author concludes that a radical redefinition of State sovereignty is an indispensable condition of further progress in this area.

In another critical essay B. V. A. Roling discusses the treatment of criminal responsibility

at the Geneva Conference and is particularly disturbed by the suggestion that in certain conflicts the *ius in bello* may not be equally applicable to both sides. The crucial issue of the enforcement of the law is the subject of contrasting studies by R. Bierzanek and G. Abi-Saab, the first a discussion of reprisals as a means of enforcement in Protocol I against the background of the history of the doctrine; the second a review of the general issue of implementation, with special emphasis on the changing roles of the Protecting Power and the Red Cross.

The final group of papers provides an analysis of the attitudes of particular groups of States towards the development of humanitarian law. Not surprisingly, there is a good deal of overlap with some of the earlier essays, but the advantages of this fresh perspective are well brought out in C. Lysaght's review of the position of selected western States and D. Ciobanu's essay on the socialist States. Underlining a point made by a number of other contributors, the latter emphasizes the importance of ensuring that all parties to armed conflict have an equal interest in the application of its rules.

It is planned to publish the proceedings of two seminars at which these and the other essays in the present volume were discussed, a step which will further increase the value of some most useful studies.

J. G. MERRILLS

*Parliamentary Control over Foreign Policy: Legal Essays.* Edited by ANTONIO CASSESE. Alphen aan den Rijn: Sijthoff and Noordhoff, 1980. x + 206 pp. Dfl. 65.

'It is a truism that foreign policy is becoming more and more complex and increasingly requires prompt decisions which are more aptly taken by the executive branch of a government and that, consequently, national parliaments tend to lose their power of control over foreign policy-making . . . The purpose of this collection of papers is to see where and how this erosion has taken place, and whether or not there is any chance of devising new forms of "intervention" and control of parliaments in foreign affairs' (p. vii).

The papers vary considerably in length. There are long papers by Christian Tomuschat and Antonio Cassese on West Germany and Italy respectively, but only short papers by Ian Brownlie, Jean-Pierre Cot and Françoise Mendel on the United Kingdom, France and Denmark respectively. At times the brevity is excessive; for instance, Professor Brownlie devotes only eleven lines to the question whether the Act of Union (1707), the Statute of Westminster (1931) and the European Communities Act (1972) are entrenched against repeal by the British Parliament.

Patricia Weiss Fagen's paper on the United States looks only at the attempts by Congress during the mid 1970s to make promotion of human rights a major aim of United States foreign policy. The editor explains that 'emphasis has been placed on one particular aspect of the role of the U.S. Congress that is currently of particular significance, while no contribution on the general role of Congress in foreign affairs has been considered necessary because of the abundance of scholarly writings available in English on the matter' (p. vii).

The late Christoph Sasse contributed a brief but informative paper on attempts by national parliaments to influence or control decision-making by organs of the E.E.C., and the book finishes with two papers by Joseph Weiler and Giorgio Gaja on the role played by the European Parliament in the external relations of the E.E.C.

All of the papers printed in the book give a good account of the way in which various parliaments operate, but most of them are less successful when it comes to *measuring* the influence which parliaments exercise *in practice*. This is probably because most of the contributors are lawyers. A lawyer can analyse constitutional provisions and describe the functions and procedure of parliamentary committees, but the skills of a political scientist are needed in order to *measure* the relative influence of different bodies in the decision-making process.



However, it would appear that national parliaments in Western Europe exercise less influence over foreign policy than Congress does in the United States. The contributors make little attempt to assess the advantages and disadvantages of this state of affairs, or to suggest remedies. Does the explanation of the difference between the influence exercised by Congress and the lack of influence exercised by parliaments in Western Europe lie in the Congressional committee system? Some of the evidence collected in this book lends some support to that view; in particular, Professor Sasse's paper demonstrates the crucial role played by parliamentary committees in the United Kingdom, Denmark, West Germany and Ireland in enabling national parliaments to influence the behaviour of national Ministers in the E.E.C. Council of Ministers (the parliaments of the other five member States take far less interest in E.E.C. affairs). But parliamentary committees are not always effective, as is shown by Professor Cot's criticism of the impotence and apathy of the Foreign Affairs Committee of the French National Assembly. Alternatively, there is the danger of a parliamentary committee becoming too closely identified with the government and with the secrecy which often cloaks the process of government; this is a real danger in West Germany, where, according to Professor Tomuschat, the government is often unwilling to provide information to the Foreign Affairs Committee of the Bundestag unless the Committee agrees to treat that information as strictly confidential.

MICHAEL AKEHURST

*U.N. Law/Fundamental Rights: Two Topics in International Law.* Edited by ANTONIO CASSESE. Florence: Sijthoff and Noordhoff, 1979. x + 258 pp.

This book contains an assortment of essays which is useful as a basis for understanding significant new trends in the world community. Fifteen essays are divided into two broad areas—United Nations law and international protection of fundamental rights of individuals and peoples. The essays represent a variety of perspectives.

Bert Röling views the United Nations as having served a pivotal function in reorienting international law away from its traditional European-American framework, toward a more universalist approach that recognizes the needs of poorer nations. Röling sees a trend toward social justice ('positive peace'), which began with decolonization and is now rapidly proceeding on a course likely to result in the abolition of neocolonialism. He notes, however, that the movement is not without contradictions, and that there are possible constraints upon the U.N.'s role.

Dan Ciobanu discusses a trend toward co-operation in Soviet-American relations within the U.N. Underlying structural factors which have contributed to this trend include greater parity in strength between the U.S.S.R. and the U.S., the latter's loss of majority control over the U.N. political organs, the emergence of a Third World bloc professing non-alignment, and the decline in leadership of both the Soviet Union and the United States within their respective camps. An additional basis for long-term co-operation between the U.S. and the U.S.S.R. is provided by the Third World's formulation of economic demands which are contrary to the interests of both 'superpowers'.

Remigiusz Bierzanek notes a trend toward regionalism which, he argues, results from the ineffectuality of international organizations' efforts to maintain peace and the limitations of strictly military alliances. Bierzanek focuses on recent steps taken toward an all-European security system which culminated in the Final Act of Helsinki, signed on 1 August 1975. The goals of such a system are to link States 'politically, economically, legally and culturally', as well as militarily. While conditions in Europe are favourable to this kind of an approach, existing military alignments in a cold-war context set its realization far into the future.

Significantly, both Ciobanu and Bierzanek are against altering the U.N. Charter to satisfy recent demands of smaller nations seeking greater equality within the organization. Thus, for example, even when Ciobanu acknowledges that the formation of a new

U.S.S.R.-U.S. 'Co-directorate' might work to other nations' disadvantage, as it did when the two countries 'endeavoured to freeze the unequal military status of nations' with a non-proliferation treaty, he maintains that the imperatives of peace forbid tampering with the delicate balance reflected in the Charter. Similarly, Bierzanek opposes alteration of Russo-American dominance in the Security Council despite the fact that such dominance may impede the growth of regionalism.

Jean Salmon, Benedetto Conforti and José Sette Camara focus on a number of specific issues. Salmon deals with the impact of politics on characterization in public international law. Conforti argues that the International Court of Justice should expand its competence to include the rendering of advisory opinions in political disputes. Finally, Sette Camara discusses the highlights of the Vienna Convention on the Representation of States in their Relations with International Organizations of 1975.

Theo van Boven begins the next section with a broad view of the U.N. human rights field, placing current trends in a historical framework. He identifies three stages in this development: standard-setting (1945-55), promotion (1955-65) and protection (1965 to the present). Thomas McCarthy and Virginia Leary discuss particular aspects of the development. McCarthy examines the impact of transnational corporations on human rights. He summarizes case studies done by others and looks at international efforts to formulate a code of conduct for transnationals. He concludes that basic questions remain unanswered regarding the status, obligations and rights of T.N.C.s in relation to home States as well as host States and the rest of the international community. Leary scrutinizes another important group of actors—the non-governmental organizations (N.G.O.s)—and points out that N.G.O.s have a contribution to make in the elaboration of international law.

The book includes a series of essays dealing with the question of self-determination. Héctor Gros Espiell cites debates in the U.N. and in other international diplomatic conferences as evidence for the claim that self-determination has become a principle of *jus cogens*. This allows him to conclude that treaties between States or 'any international legal act . . . which violates the right to self-determination of peoples subjected to colonial or alien domination could . . . be considered void' (p. 171). Antonio Cassese closely analyses the emerging concept of political self-determination. Examining instruments at the international, regional and transnational (non-governmental) levels, he contends that 'the sequence of these various instruments shows that a new and more meaningful concept of political self-determination has gradually emerged . . . [that] is more consonant with the new demands of freedom than the traditional approach to self-determination' (pp. 137-8). Significantly, Cassese concludes his study with the 'Algiers Declaration of the Rights of People' (1976), drawn up by a group of individual experts rather than sovereign States. This document also forms the basis of two separate papers by François Rigaux and Richard Falk. Both authors would agree with Cassese's assessment that the Algiers Declaration is 'more radical and closer to the real needs of peoples' (p. 153) than all previous instruments on self-determination. Rigaux compares the Declaration with a 'Copernican revolution', which 'moves the centre of gravity of international law from the individual towards the people' (p. 211).

Falk's analysis is notable for the universality of its criticisms. Most authors criticize particular human rights approaches, while supporting others. Van Boven challenges Western sceptics who blind themselves to legitimate issues raised by developing countries. B. G. Ramcharan criticizes those Third World governments who would sacrifice civil and political rights to the imperatives of economic development. Youri Rechetov presents a persuasive argument which upholds the socialist principle of State sovereignty in human rights and provides guidelines for determining the responsibility of States in exceptional cases of crimes against humanity or gross and flagrant violations. Falk spares neither the socialist States, nor the West, nor the Third World in his critique. He maintains that

The Algiers Declaration . . . is a framework of rights asserted by and for the peoples of the world over and against the claims and activities of governments, multinational corporations and international institutions (p. 233).

The reader will come away from this book having experienced nearly the entire spectrum of political and ideological positions on a number of topical issues.

THERESA D. GONZALES

*The Enclosure of Ocean Resources.* By ROSS D. ECKERT. Stanford University: Hoover Institution Press, 1979. xvi + 390 pp.

The author's main thesis is to disprove the popular conviction that the current process of 'creeping jurisdiction' will foster the over-exploitation of marine resources. This is done through an economic analysis of the consequences of States' exclusive claims to offshore resources. This phenomenon is described as 'an economic response to fundamental changes in world population growth, demands for goods and services from the sea, and the technologies for extracting these goods and services'.

The book is divided into two parts. The first analyses the economic problems involved in enclosing offshore waters; the second evaluates the achievements of U.N.C.L.O.S. III, and U.S. ocean policy. Professor Eckert's approach is novel. He demonstrates that the theory of the conversion process to private property rights for land resources enunciated by economists (e.g. Demsetz) is equally applicable to enclosures of ocean resources. The 'enclosure movement', he contends, if based on economic criteria, will usually be superior to the regime based entirely on high seas freedoms or to the international controls evolving at U.N.C.L.O.S. III.

His review of the developments at U.N.C.L.O.S. III and their economic implications is commendable. He examines the proposals in the negotiating texts and their effect on avoiding economic inefficiency with regard to navigation, fisheries, exploitation of hydrocarbons, the marine environment, marine scientific research and the exploitation of the deep seabed minerals. The results are compared with the position under a global system of unilateral claims. This comparison, although useful, is very rough as most of the 'hard' economic data are still generally not available.

The work also includes an economic critique of U.S. ocean policy. The author claims that the U.S. executive branch has failed to perceive its economic interests and concludes that on the basis of the negotiations conducted at U.N.C.L.O.S. III the U.S. will suffer economic losses.

It is not easy to agree with all the arguments put forward in this book. Clearly, the author is not proposing unrestrained exploitation of the ocean's resources. His main concern lies in preventing economic inefficiency by encouraging unilateral claims. This could very well be justified. However, the differences that exist in the technical competences of States will mean that few States have the potential to exploit the enclosed resources. The area belonging to the common heritage of mankind has already been reduced substantially.

The study provides an excellent guide to the understanding of the economic factors at play in the 'enclosure process' of marine resources. It highlights economic values which have been taken too much for granted or which have often been neglected. Economists, political scientists, lawyers and Government officials should find this study valuable in assessing the economic significance of setting up an exclusive economic zone.

DAVID J. ATTARD

*Die Staatenbeschwerde, das Verfahren vor der Vergleichskommission nach der Rassendiskriminierungskonvention im Lichte vorliegender Modellverfahren.* By WINFRIED EGGERS. Schriften zum Völkerrecht, vol. 61. Berlin: Duncker & Humblot, 1978. 219 pp. DM. 74.

In an article written in 1966, Egon Schwelb appealed to international lawyers to carry out a careful comparative analysis of the International Convention on the Elimination of All Forms of Racial Discrimination (C.E.R.D.). In response to this call, Eggers's work



examines the procedural aspects of the convention by way of comparison with other international procedures for the protection of human rights. It is, therefore, both a commentary on the substance of the Convention as well as a contribution to legal writing on international procedures serving the protection of human rights.

The individual complaints procedure under Article 14 of the Convention is not yet operative for want of a sufficient number of declarations of acceptance by States. The main importance, therefore, resides in the proceedings which one State party may institute against another (Articles 11-13). Although the procedure is obligatory in the sense of being independent of declarations of acceptance by contracting States—by contrast, for instance, with that instituted by Article 41 of the International Covenant on Civil and Political Rights—it has not yet been applied in practice. Of the two organs involved in the procedure, the Committee on the Elimination of Racial Discrimination and the *ad hoc* Conciliation Commission, only the latter is considered extensively.

The Convention determines the function of the Commission only in elementary outline and makes no attempt to provide a systematic code of procedure to be followed by the Commission. Consequently, the author has endeavoured, first, to classify the Conciliation Commission within the systems of peaceful settlement procedures available in international law and, secondly, to investigate to what extent procedures under other instruments can serve as models for the purpose of supplementing the rather sketchy provisions governing its own (cf. Articles 12 (8), 13 (1) C.E.R.D.).

Within this framework the author surveys a number of conciliation procedures, whether bilateral (e.g. Bryan Treaties 1913; German-Swiss Treaty of 1927; Locarno Treaties 1925) or multilateral (e.g. General Act of Geneva 1928 and Revised General Act of 1949; General Convention of Inter-American Conciliation of 1929; Bogotá Pact 1948) or set up by an international organization (e.g. Article 26 I.L.O.; Article 28 European Convention on Human Rights; Articles 1, 17 of U.N.E.S.C.O. Protocol of 1962), evaluates the resulting experience, and concludes that the C.E.R.D. Commission has two functions: that of securing the fulfilment of human rights and that of an organ for the pacific settlement of disputes.

As regards the first function the Commission plays an active role: it does not merely observe and monitor breaches of the Convention by gathering reports from the contracting States, but suggests the means by which breaches may be remedied. The Commission's independent role is underlined by the fact that it alone shall 'adopt its own rules of procedure' (Article 12 (3) C.E.R.D.). This terse, and somewhat abstract, formulation of the Commission's procedural autonomy constitutes an application to the Conciliation Commission of Article 12, paragraph 1, of the Model Rules on Arbitral Procedure which provide that 'in the absence of any agreement between the parties concerning the procedure of the tribunal, or if the rules laid down by them are insufficient, the tribunal shall be competent to formulate or complete the rules of procedure'. There can be little doubt that Article 12, paragraph 3, guarantees a considerable measure of flexibility. Doubts persist, however, as to the details of such a procedure.

It is the author's painstaking search for model rules of procedure to be derived from some of the numerous comparable international procedural 'codes' which constitutes the major part of the book. The classes of procedure considered are judicial and arbitral procedures (including, *inter alia*, the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907, the Statutes and Rules of Court of the P.C.I.J., the I.C.J. and the European Court of Justice), procedures for inquiries and conciliation, as well as equivalent procedures operating in the field of human rights protection (including, *inter alia*, the rules of procedure of the Committee of the C.E.R.D., Articles 24-6 I.L.O., Articles 41 and 42 of the International Covenant on Civil and Political Rights). The meticulous scrutiny of these instruments is concerned with elements of organizational law (composition, status and choice of members of commission, sessions, agendas, deliberations and the like matters) and of procedural law. The author's various suggestions as to which of the rules so found would offer the most appropriate solution for the purposes of the C.E.R.D.

Commission add up to a veritable procedural code. Despite the admirable efforts expended on this synthesis of international procedural law, the author himself warns against possible temptations of an excessively detailed model code of procedure. He pertinently remarks that the practicability, in international law, of procedural rules is inversely proportional to their degree of exhaustiveness and precision (p. 20). This observation applies particularly to Conciliation Commissions whose success appears to depend to a large extent on their procedural *souplesse* (Wehberg, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 19 (1958), p. 551 at p. 591). The acceptance of international obligations is no guarantee of their fulfilment; the imposition of too detailed and inflexible a procedure for their implementation would equally fail. To have shown this is the merit of this scholarly book on a complex and as yet largely unexplored subject.

FRIEDL WEISS

### *European Court of Human Rights: Publications.*

*Series A—Judgments and Decisions: De Wilde, Ooms and Versyp* cases, Decision of 28 May 1970, Judgments of 18 November 1970 (Question of Procedure) and 18 June 1971, 75 pp.; vol. 14, *De Wilde, Ooms and Versyp* cases, Judgment of 10 March 1972 (Question of the Application of Article 50 of the Convention), 22 pp.; vol. 15, *Ringeisen* case, Judgment of 22 June 1972 (Question of the Application of Article 50 of the Convention), 12 pp.; vol. 16, *Ringeisen* case (Interpretation of the Judgment of 22 June 1972), Judgment of 23 June 1973, 13 pp.; vol. 17, *Neumeister* case, Judgment of 7 May 1974 (Question of the Application of Article 50 of the Convention), 21 pp.; vol. 18, *Golder* case, Decision of 7 May 1974; Judgment of 21 February 1975, 63 pp.; vol. 19, *National Union of Belgian Police* case, Decision of 12 April 1975; Judgment of 27 October 1975, 44 pp.; vol. 20, *Swedish Engine Drivers Union* case, Judgment of 6 February 1976, 18 pp.; vol. 21, *Schmidt and Dahlström* case, Judgment of 6 February 1976, 18 pp.; vol. 22, case of *Engel and Others*, Decision of 1 October 1975; Judgment of 8 June 1976; Judgment of 23 November 1976, 71 pp.; vol. 23, case of *Kjeldsen, Busk Madsen and Pedersen*, Judgment of 7 December 1976, 33 pp.; vol. 24, *Handyside* case, Decision of 29 April 1976; Judgment of 7 December 1976, 37 pp.; vol. 25, case of *Ireland v. United Kingdom*, Decision of 29 April 1976; Judgment of 18 January 1978, 141 pp.; vol. 26, *Tyrer* case, Judgment of 25 April 1978, 32 pp.; vol. 27, *König* case, Decision of 23 April 1977; Judgment of 28 June 1978, 52 pp.; vol. 28, case of *Klass and Others*, Decision of 18 November 1977; Judgment of 6 September 1978, 36 pp.; vol. 29, case of *Luedicke, Belkacem and Koç*, Judgment of 28 November 1978, 27 pp.; vol. 30, *The Sunday Times* case, Decision of 27 October 1978; Judgment of 26 April 1979, 69 pp.; vol. 31, *Marckx* case, Decision of 13 March 1978; Judgment of 13 June 1979, 63 pp.; vol. 32, *Airey* case, Judgment of 9 October 1979, 30 pp.; vol. 33, *Winterwerp* case, Judgment of 24 October 1979, 30 pp. Strasbourg: Registry of the Court, dates as of Judgments.

These bilingual publications continue the series reviewed in this *Year Book*, vol. 45 (1971), p. 439. Commencing with the *Year Book*, vol. 46 (1972-3), David Harris has contributed systematic commentaries on decisions of the European Commission and Court, and also of the Committee of Ministers. The *Year Book* has also published a study of 'The Application of Article 6 (1) of the European Convention on Human Rights to Administrative Law' from the same hand: vol. 47 (1974-5), p. 157. Another study much concerned with the application of the European Convention was that of Professor Rosalyn Higgins, entitled 'Derogations under Human Rights Treaties': this *Year-Book*, vol. 48 (1976-7), p. 281. In addition contributions have appeared dealing with 'The European Convention on Human Rights in the Austrian Constitutional Court' (H. Petzold, vol. 46 (1972-3), p. 401) and 'Surinam and the European Convention on Human Rights' (Marc-André Eissen, vol. 49 (1978), p. 200).



The Publications of the Court (which include *Series B—Pleadings, Oral Arguments and Documents*) present an impressive mass of material. Writing in 1971 the reviewer remarked that 'the output of the Court and the Commission has now reached the point at which a concordance or systematic exegesis of the Convention is called for'. This remains true.

The decisions of the last eight years contain much of interest to international lawyers, and this not least in respect of the techniques of treaty interpretation. In particular, the *Golder, National Union of Belgian Police, Marckx* and *Airey* cases present not only nice issues of textual analysis but major questions of general approach and policy. Special interest must attach to the first three of these cases, in which Judge Sir Gerald Fitzmaurice explains his reasons for differing from the majority of the Court on major issues of interpretation. On occasion such differences are seen by lawyers as a simple conflict between a 'teleological' and a 'textual' or 'literal' concept of interpretation. This is very far from the truth. Fitzmaurice makes the effort to place the European Convention within a general perspective and to approach it as 'an instrument of a very special kind': *Golder* case, p. 52 (para. 38). Moreover, the British judge is not indulging in a pretence that it is all mere semantics: policy issues and questions of approach are brought clearly into view and mercilessly reviewed. A constant and strongly expressed concern is the danger of forgetting the relation between the benevolent urge to apply an extensive and curative interpretation and the fact that the Convention is an inter-State treaty, deriving its obligatory force from the consent of the States parties. Thus in his separate opinion in the *Golder* case (pp. 51–2) there is the following admonition:

(c) Finally, it must be said that the above quoted passages from the Judgment of the Court are typical of the cry of the judicial legislator all down the ages—a cry which, whatever justification it may have on the internal or national plane, has little or none in the domain of the inter-State treaty or convention based on agreement and governed by that essential fact. It may, or it may not be true that a failure to see the Human Rights Convention as comprising a right of access to the courts would have untoward consequences—just as one can imagine such consequences possibly resulting from various other defects or *lacunae* in this Convention. But this is not the point. The point is that it is for the States upon whose consent the Convention rests, *and from which consent alone it derives its obligatory force*, to close the gap or put the defect right by an amendment—not for a judicial tribunal to substitute itself for the convention-makers, to do their work for them. Once wide interpretations of the kind now in question are adopted by a court, without the clearest justification for them based solidly on the language of the text or on *necessary* inferences drawn from it, and not, as here, on a questionable interpretation of an enigmatic provision, considerations of consistency will, thereafter, make it difficult to refuse extensive interpretations in other contexts where good sense might dictate differently: freedom of action will have been impaired.

38. In my view, the correct approach to the interpretation of Article 6. 1 is to bear in mind not only that it is a provision embodied in an instrument depending for its force upon the agreement—and indeed the *continuing* support—of governments, but also that it is an instrument of a very special kind, emulated in the field of human rights only by the Inter-American Convention on Human Rights signed at San José nearly twenty years later. This was in considerable measure founded on the European one, particularly as regards its 'enforcement' machinery. But it has not been brought into force. Such machinery is not to be found in the United Nations Covenants on Human Rights, which in any case also do not seem to be in force. Speaking generally, the various conventions and covenants on human rights, but more particularly the European Convention, have broken entirely new ground internationally, making heavy inroads on some of the most cherished preserves of governments in the sphere of their domestic jurisdiction or *domaine réservé*. (Footnotes omitted.)

Similar views are expressed by the Judge in the *National Union of Belgian Police* case (pp. 30–4) and the relevance of the views of Governments is reasserted (see para. 8). The warning is here expressed in the context of the attitudes of the non-European Governments in weighing the risks of introducing the right of individual petition:

There is a risk in my opinion that such governments would be seriously deterred from ever doing so if it appeared that one of the consequences was liable to be that the limitations which they intended as to the scope of the relevant covenant or convention may not be respected by the organs of enforcement.

The separate opinion of Judge Sir Gerald Fitzmaurice contains an examination of the



means by which reference can properly be made to 'the objects and purposes' of a treaty, which 'are not something that exist *in abstracto*' (p. 33). In these clashes of opinion Fitzmaurice is no less 'teleological' than the majority of the Court, but it is in the nature and quality of the teleology that the difference lies. In the approach of Fitzmaurice the objects and purposes must have political roots and the Convention must be not only 'effective' but *alive*. The alternative will be a brightly painted vehicle ignored by potential users.

The jurisprudence of the Court has touched on other matters of, or highly relevant to, international law in general. These matters may be set forth in summary form:

1. The concept of discrimination: *National Union of Belgian Police* case, paras. 43-9; *Swedish Engine Drivers Union* case, paras. 44-8; *Schmidt and Dahlström* case, paras. 38-42; case of *Engel and Others*, paras. 70-4; case of *Kjeldsen, Busk Madsen and Pedersen*, para. 56; *Handyside* case, paras. 65-6; *Ireland v. United Kingdom*, paras. 225-35 (and see the separate opinion of Judge Sir Gerald Fitzmaurice, paras. 44-5; and the separate opinion of Judge Matscher, pp. 140-1); *The Sunday Times* case, paras. 69-73; *Marckx* case, paras. 28-65 (and see the dissenting opinions of Judges Sir Gerald Fitzmaurice, paras. 23-6, and Bindschedler-Robert; and the partly dissenting opinions of Judges Matscher and Pinheiro Farinha).

2. The concepts of 'just satisfaction' and 'moral damage': *De Wilde, Ooms and Versyp* cases, Judgment of 10 March 1972, paras. 18-25; *Ringeisen* case, Judgment of 22 June 1972, paras. 23-5; *Neumeister* case, Judgment of 7 May 1974, paras. 28-44; *Golder* case, para. 46; *Tyrer* case, paras. 44-5; *Marckx* case, para. 68 (and see the joint dissenting opinion, pp. 32-3).

3. The meaning of the phrase 'prescribed by law': *The Sunday Times* case, paras. 46-53; *Winterwerp* case, paras. 44-50.

4. The meaning of the phrase 'respect for . . . private and family life': case of *Klass and Others*, paras. 39-42; *Marckx* case, *passim* (and see, in particular, the dissenting opinion of Judge Sir Gerald Fitzmaurice); *Airey* case, paras. 31-3 (and see the dissenting opinions).

5. The definition of 'torture' and 'inhuman or degrading treatment or punishment': *Ireland v. United Kingdom*, paras. 162-85 (and see the separate opinions of Judges Zekia, pp. 97-9, O'Donoghue, pp. 105-8, Sir Gerald Fitzmaurice, pp. 115-31 (paras. 12-36), and Evrigenis, pp. 136-8); *Tyrer* case, paras. 28-35 (and see the separate opinion of Judge Sir Gerald Fitzmaurice, *passim*).

6. The general principles of law (as an element in treaty interpretation): *Golder* case, para. 35 (and see the separate opinion of Judge Sir Gerald Fitzmaurice, para. 35).

7. State responsibility in respect of administrative practices: *Ireland v. United Kingdom*, paras. 156-9.

8. State responsibility in respect of legislative measures: *Ireland v. United Kingdom*, paras. 236-43.

9. The principle forbidding denial of justice (as an element in treaty interpretation): *Golder* case, para. 35 (at p. 17).

10. Justiciability (or admissibility) of claims (e.g. because the adjudication on the merits would be devoid of purpose): *Ireland v. United Kingdom*, paras. 152-5 (and see the separate opinion of Judge Sir Gerald Fitzmaurice, paras. 3-7).

11. 'Victims of violations' of human rights standards set by treaty: case of *Klass and Others*, paras. 30-8.

12. Application of the local remedies rule: *Ireland v. United Kingdom*, paras. 156-9 (and see the separate opinion of Judge Sir Gerald Fitzmaurice, paras. 8-11).

13. Conditions for an effective waiver of rights: *Neumeister* case, paras. 32-6.

14. The standard of proof in respect of treaty violations: *Ireland v. United Kingdom*, paras. 160-1.

IAN BROWNLIE

*Legal Aspects of International Terrorism*. Edited by ALONA L. EVANS and JOHN F. MURPHY. Lexington, Massachusetts: D. C. Heath & Co., 1978. xxxix + 690 pp. £22.50.

Despite its title, the above work is not solely concerned with legal analysis, but also gives full consideration to the political, economic and social contexts within which terrorism takes place. It contains a great deal of useful scientific and statistical information, which is not readily obtainable elsewhere, and it will no doubt be treated as a very useful reference work by all those concerned with international terrorism for a very considerable time in the future. Its very considerable value is enhanced by its appendix, which summarizes the primary conclusions and recommendations of the study, and by the valuable legal information it contains relating to a number of different jurisdictions.

The work results from a research project undertaken by the American Society of International Law, and it contains contributions from academic and practising lawyers and other experts. It is divided into two parts: the first part considers the existing or possible future targets of terrorist attacks, whilst the second is concerned with the prevention and control of terrorism. The first seven chapters deal with aircraft, nuclear installations, vessels and offshore installations, the acquisition of new weapons by terrorist organizations, diplomats and diplomatic property, other personnel and property which is not granted a special status or protection under international law and the staff and property of multinational business organizations. The examination of certain less familiar potential targets of terrorist attacks and possible new methods of terrorism much enhances the value of the work, as also does the analysis of the special problems encountered by multinational undertakings contained in chapter 7.

The second part of the work begins with a brief but very useful contribution by Professor Bassiouni. The writer expresses the view which he has also expressed elsewhere, and with which the reviewer respectfully agrees, that an attempt should be made to limit the political offender's immunity from extradition. Professor Evans and Mr. A. Kerstetter, who have also made valuable contributions to the second part of the study, adopt a similar approach to this problem. The chapter on State self-help, which includes a cautious and balanced analysis of the Entebbe raid, is of great interest.

The work contains a useful analysis of the defects of the O.A.S. Convention<sup>1</sup> and a valuable account of the United Nations Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons including Diplomatic Agents.<sup>2</sup> The study is not only characterized by the consideration which it gives to problems which are not dealt with elsewhere, but also by the high quality of the contributions. A policy-oriented approach is adopted in certain chapters, which are exhaustively researched and documented. The terminology which they employ will be unfamiliar to some, but should present few difficulties.

An attempt is made to define terrorism on p. xv of the study. This definition excludes State terrorism, which was outside the scope of the project. Not much is said in the work about the possibility of establishing an international criminal court. More might have to be said about the multilateral efforts which have been made, and which have failed, to bring an effective international convention on terrorism into existence. The conclusions contained in the very useful appendix to the work are generally worthy of support especially in so far as they relate to the need to limit the freedom of political offenders from extradition in cases of terrorism. The recommendations for future action contained in the work appear generally moderate and unexceptionable, and are the result of extensive researches in a number of different fields. One of the most interesting, and controversial, of these

<sup>1</sup> Convention to Prevent and Punish the Acts of Terrorism taking the Forms of Crimes against Persons and Related Extortion that are of International Significance, 2 February 1971, *Treaties and other International Acts Series*, No. 8413.

<sup>2</sup> See G. A. Res. 1366, *General Assembly Official Records*, 28th Session, Suppl. No. 30 (A/9030) (1973).

conclusions is the suggestion that a Protocol should be added to the Geneva Conventions of 1949 to guarantee a private right of action against terrorists in domestic courts for compensatory relief.

The book has very considerable merits, and its purchase can be safely recommended to all who are interested in practical and effective means of combatting terrorism and possible future approaches to this problem.

FRANK WOOLDRIDGE

*Studies in International Law. With Special Reference to the Arab-Israel Conflict.* By NATHAN FEINBERG. Jerusalem: The Magnes Press, 1979. xii + 640 pp.

This is a collection of twenty-one essays and short monographs, published by the author from 1929 to 1972 (though nine of the more important ones are concentrated in the period 1968-72). All but four are in English; several have been translated from the original Hebrew and are therefore only generally accessible here.

Almost all of the studies concern aspects of the Jewish question, the mandate for Palestine or the Arab-Israel conflict. The most significant are the two fairly well-known attacks on Arab legal writing in the field: 'The Arab-Israel Conflict in International Law (A Critical Analysis of the Colloquium of Arab Jurists in Algiers)' (1970: pp. 433-514), and 'On an Arab Jurist's Approach to Zionism and the State of Israel' (1971: pp. 515-611). These take up a third of the book, but they are among the more important statements of the 'Israel and Zionist point of view' (p. 436), and this collection will be a convenient reference point for them. The other essays on these subjects are in general of much less significance, many of them dealing with rather specialized historical matters.

Interesting questions of general international law include the treatment of the doctrine of desuetude and its comparison with *rebus sic stantibus* (now to some extent superseded by the Vienna Convention) (1958: pp. 17-54); the argument (reprinted from this *Year Book*) against a general right of unilateral withdrawal from international organizations (1963: pp. 124-69); an account of the dispute over Russian discrimination against foreign Jews in the late nineteenth century and the interpretation of the 'national treatment' clause in bilateral treaties with Russia (1968: pp. 182-212); and a description of the political and legal steps taken against German anti-Jewish measures by the Committee of Jewish Delegations before the League of Nations (1970: pp. 311-37). At least for students of the earlier phases of the Arab-Israel conflict this will be a useful source of reference.

JAMES CRAWFORD

*China and the Law of the Sea, Air and Environment.* By JEANETTE GREENFIELD. Alphen aan den Rijn and Germantown, Maryland: Sijthoff and Noordhoff, 1979. xx + 362 pp. (including appendices, bibliography and index). Dfl. 65.

This is an original and very useful study. Whilst there are fairly brief sections dealing with air and outer space, and protection of the environment, the bulk of the material is concerned with the law of the sea as reflected in Chinese practice and literature, and positions adopted at the Third United Nations Conference. The book appears to be the first monographic treatment of Chinese practice and doctrine in a particular area of the law of nations. The material is well documented and there is an abundance of information provided in the substantial appendices. The value of such a study is self-evident and it is to be hoped that Dr. Greenfield will be able to produce a new edition in due course. The treatment is rigorously empirical and ideological traps are carefully avoided. Indeed, in her conclusion the writer states that 'the ideological aspect is not of great importance



in practical terms, but . . . there is to a marked degree an approach which can be characterised as essentially Chinese'.

There are certain reservations to be made but it must be said that these do not substantially detract from the substance of the study of Chinese practice. In the first place the writer leaves obscure her view of the 1958 Conventions and the Informal Composite Negotiating Text as evidence of general international law. Secondly, the range of reference to the literature of international law is narrow and this is a general characteristic of doctoral theses prepared in Cambridge. The third reservation is of greater weight. The framework of knowledge of general international law has a certain weakness and as a consequence particular pieces of the Chinese practice are not placed in a proper perspective. Three examples may be taken. In the context of the problems of the continental shelf, reference is made to the 'exploitability criterion' of the 1958 Convention (p. 121). The writer seems unaware that only a minority of lawyers or governments saw the Convention in this way, even before the decision in the *North Sea* cases. In several passages the view is taken that the right of innocent passage for warships is a generally accepted concept (for example, pp. 231-2), subject to attack by the Chinese. Perusal of the available sources readily reveals how divided was opinion and practice at least as late as 1958: see, for example, the *Yearbook of the I.L.C.*, 1956, vol. 2, pp. 276-7. Thirdly, reference is made to Chinese claims to submerged shoals and banks (p. 151). Such claims raise some difficult points of general international law but they are recorded without any reservation or commentary.

The fact remains that Dr. Greenfield has produced a most helpful study. It should be pointed out that the print is closely set and therefore the book is larger than the pagination would indicate. A particular interest attaches to the treatment of issues of shelf delimitation involving China. This is most informative. Incidentally, the text was composed before the Decisions in the *English Channel* arbitration became available.

IAN BROWNLIE

*How Nations Behave. Law and Foreign Policy.* By LOUIS HENKIN. 2nd edition. New York: Columbia University Press, 1979. xv + 400 pp. (including index). Hardback \$31.25, paper \$8.75.

The first edition of this book, published in 1968 (London: Pall Mall Press), was a reworking of lectures published in the *Recueil des cours*, volume 114, of the Hague Academy of International Law. The new edition is rather longer than the first and, apart from updating, there is a good deal of restructuring. New chapters are as follows: the politics of law-making (chapter 2), the Third World (chapter 6), competing agendas for new law (chapter 9), the politics of economics: the new international economic order (chapter 10), remaking the law of the sea (chapter 11), idealism and ideology: the law of human rights (chapter 12), and Vietnam (chapter 16). The second edition lacks a bibliography but there are extensive notes.

The book is important since it is one of the best attempts to assess the role of international law in international relations, and to do so in a reasonably small compass. Moreover, it is written in a spare and lucid prose, no heavy intellectual apparatus is imposed upon the material, and Professor Henkin combines academic distinction and practical experience. The result is a first-class book which should be of interest both to students and to the professional.

Professor Henkin covers a vast agenda and there can be little room for carping about omissions. However, even on the grand scale there should be more emphasis on the consequences for international order of the internal politics and organization of States. This is a pervasive problem and the well-known episodes in recent American experience are but well-reported illustrations of a very general issue. Most violations of human rights are, in the first place, due to the malfunction of *domestic* law and administrative practices. Professor Henkin's text has one depressing aspect. In common with most Western commentators the emigration of Jews from the Soviet Union and the issue of 'dissidents'

are given emphasis as contemporary questions of human rights. This selective emphasis is depressing for at least two reasons. The first is the appalling absence of proportion in a context in which no reference is made to the fate of 80,000 persons driven out of northern Cyprus, to the huge communities of Palestinians not accorded the right of return, or to the endemic racialism of Israeli policies. The second reason is that, as a matter of fact, it would appear that Jews are receiving privileged treatment in the matter of emigration from the Soviet Union and, in so far as the flow is going to Israel, the emigration supports the demographic manipulation practised by Israeli governments for reasons which have no connection with human rights.

IAN BROWNLIE

*Le Gatt et les zones du libre échange.* By RODOLPH S. IMHOFF. Geneva: Georg, 1979. 251 pp.

In a very well-constructed study, Dr. R. S. Imhoff presents a useful contribution to the international law of trade. He begins with an examination of the general tools used by G.A.T.T. to promote economic liberalism, i.e. non-discrimination, tariff concession and regional integration. He then focuses on the system created by Article XXIV co-ordinating the principle of universality, the most important in G.A.T.T., with the method of regionalism and more precisely with that of the Free Trade Area. The analysis by the contracting parties of the different models of the Free Trade Area, as requested on the basis of Article XXIV, constitutes the most original part of the book. These models are reviewed in four successive chapters.

The first is concerned with the agreements concluded between developing countries; these agreements were looked upon more favourably on the basis of Part IV rather than on that of Article XXIV which was initially used.

The second is devoted to agreements concluded between countries of different levels of economic development, i.e. mostly agreements to which the E.E.C. is a party. These take the form of either multilateral conventions (Yaoundé, Arusha, Lomé) or bilateral treaties (with Algeria, Morocco, Tunisia . . .). The legal basis of this new type of relationship between countries of different levels of development is questionable. It does not conform to Article XXIV because of their non-reciprocal character. However, as the contracting parties are on the whole favourable to these new relationships, they proposed several justifications: this investigation by the contracting parties could be made not in a static, but in a dynamic way; a legal basis for the unilateral preferences could be found in the G.S.P.; Article XXIV could serve as a legal basis for relations of the E.E.C. with developing countries and Part IV for those of the developing countries with the E.E.C. However, it seems more and more difficult to use Article XXIV for this kind of relationship and Part IV has come to be regarded as the only legal basis on which these treaties can be justified.

The Free Trade Zone between industrialized countries is reviewed in a third chapter and involves mainly the Stockholm Convention and the agreements between members of E.F.T.A. and E.E.C.

A last chapter deals with the more recent kinds of economic agreements between countries belonging to different economic systems. The applicability of Article XXIV in such a case is highly questionable because tariffs of these countries, when they exist, have a completely different meaning. Reciprocity, moreover, is a dubious concept when applied to relations between countries of different economic systems.

A final synthesis shows quite clearly how the Free Trade Area actually involves two different purposes. Industrialized countries have used it as a new way to create more flexible unified economic areas; developing countries were hoping by means of this new tool to secure the advantage expected from the conclusion of regional preferential trade agreements. The practice of G.A.T.T. is an attempt to satisfy these two assumptions.

In strict law it is possible to assume that a Free Trade Area can be used only between developed countries, between free-trade countries and between countries of equal economic

development. It is for this good reason and in order to bring about greater consistency between law and practice that the author concludes with some suggestions for modification to the General Agreement.

The discussion of this subject is mainly conducted in terms of rules and exceptions. The question arises, therefore, what the rule is at present: the most-favoured-nation clause, or the preferences based on Article XXIV and Part IV? It may perhaps be easier and more realistic to recognize that the G.A.T.T. system now operates two different sets of rules, each based on different principles: one for industrialized countries and the other for developing countries. Consequently, Part IV will no longer be considered as an exception to free trade, but as recognizing another aim for the General Agreement which is aid to development through trade. The consequence will be that preferences will not be granted unilaterally to developing countries as suggested, but recognized as a negotiable right for them.

MAURICE FLORY

*Manual on Space Law.* Compiled and edited by NANDASIRI JASENTULIYANA and ROY S. K. LEE. Foreword by JUDGE MANFRED LACHS. 2 volumes. Dobbs Ferry, New York: Oceana Publications, Inc.; Alphen aan den Rijn: Sijthoff and Noordhoff, 1979. Vol. 1: xv + 479 pp.; vol. 2: xii + 550 pp. \$37.50 each.

The present manual or *corpus iuris spatialis*, as the editors call it in their preface, not only bears witness to the formation of a separate branch of international law but will undoubtedly stimulate interest in and refinement of the law itself.

Volume I of the manual falls into two parts, the first containing ten essays on legal instruments concerned with specific subjects of space law, the second consisting of six essays on the law and practice of several international or regional space agencies and institutions (Intelsat, Intersputnik, Intercosmos, the European Space Agency, Inmarsat, Arabsat). Each chapter, as is pointed out by the editors, 'covers four areas of concern: the origin and process of negotiations; the major issues which were confronted and the solutions which are sought; the interpretations or understanding of the text given by the drafters; the practice which has evolved in applying the instrument, its evaluation and suggested improvements'.

Volume II contains the relevant documentation. It includes: the English texts of legal instruments, their current status as to signatures, notifications, etc., a section on *travaux préparatoires* describing, article by article, the chronological development of a particular instrument and a selected bibliography on them. The skilful editorial care with which the material in these two volumes has been arranged should ensure that international lawyers with an interest in this branch of the law will find it most convenient to work with this impressive manual.

FRIEDL WEISS

*The Host State and the Transnational Corporation.* By JUHA KUUSI. Farnborough, Hampshire: Saxon House, 1979. xv + 168 + (bibliography, table of cases, index) 9 pp. £9.50.

A century ago the main vehicle for foreign investment was bonds issued by the public authorities of capital-importing countries on the stock markets of capital-exporting countries. Nowadays the entrepreneurial activities of transnational companies represent the main vehicle for foreign investment. The question of the law governing contracts between the host State and transnational companies is therefore obviously important, and the present book, based on the author's Oxford thesis but completed after he had joined the Finnish Ministry of Foreign Affairs, makes a valuable contribution to knowledge of the subject.



Despite the rulings of the Permanent Court of International Justice in the *Serbian and Brazilian Loans* cases, there was a growing tendency after 1930 for contracts between host States and transnational companies to contain choice of law clauses excluding the application of municipal law, and arbitrators often adopted a similar approach in the absence of an express choice of law clause. Commentators disagreed about the identity of the system of law which did govern such 'internationalized' contracts; were general principles of law a legal system in their own right, or was the contract governed by public international law or transnational law, or could the contract create its own self-contained legal system? The author analyses all of these theories carefully, but does not make a firm choice among them. Instead, he argues that the 'internationalization' of such contracts represented a passing phase which has now come to an end. The General Assembly passed resolutions in 1974 and 1975 stating that contracts between a State and a foreign company cannot be subject to any legal system other than the law of the host State, and most oil concessions granted since 1970 have been expressly governed by the law of the host State.

The author's account of factual developments during the 1970s is clear and accurate, but it could be argued that these developments are less significant than he thinks. For instance, how much legal effect can be attributed to the General Assembly resolutions of 1974 and 1975, which did not even claim to be declaratory of existing law and which were opposed by most of the capital-exporting States? There is no easy answer to this question; but the question clearly needs to be asked, and the author's failure to give it thorough consideration undermines the value of his conclusions. Similarly, the fact that most oil concessions granted during the 1970s are expressly governed by the law of the host State is not evidence of any mandatory rule to that effect, but simply reflects the fact that host States are now in a stronger bargaining position than they were between 1930 and 1970.

The author concludes by urging the adoption of an international code of conduct to regulate transnational companies, which would take most of the sting out of disputes about which system of law should govern contracts between host States and transnational companies.

MICHAEL AKEHURST

*The International Law and Policy of Human Welfare.* Edited by RONALD ST. JOHN MACDONALD, DOUGLAS M. JOHNSTON and GERALD L. MORRIS. Alphen aan den Rijn: Sijthoff and Noordhoff, 1978. 690 pp.

The search for greater justice or, more accurately, distributive justice is, of course, the underlying theme which has inspired this undertaking, which consists of twenty-five essays grouped in four parts under the titles 'Structure, Value and Process', 'Human Dignity', 'Economic Development' and 'Physical Welfare'.

The first part opens with an essay by the editors on the concept of an international law of human welfare. Human needs, they argue, comprise higher values and human rights as well as basic economic and psychic aspirations. They are formulated by national élites in the light of their perception of social philosophy and their own cultural heritage and permit the discovery of universally valid criteria of human welfare. The problems raised are familiar ones: is it feasible for developing States to aim at the satisfaction of both economic and cultural needs concurrently or should priority be given to the achievement of a sound economic basis as a pre-condition for those 'higher values'? Convinced that, through historical development, 'man is slowly rationalised, and that man is moralised proportionately as he becomes more rational' (p. 11), the authors examine the experience of four types of State: the military State, the occupied State, the *laissez faire* capitalist State and the welfare State. Within the latter model the liberal and authoritarian conceptions of welfare State are exemplified by reference to the primary value goals of 'Liberty', 'Equality', 'Social Welfare' and 'Prosperity'. The authors find it both desirable and feasible to bring about a convergence of national or cultural conceptions of human welfare based on the somewhat trite observation that 'human development is the product both of genetic potentiality

and environmental conditioning' (p. 22). Welfare policies and programmes, then, become globalized through processes described *inter alia* as 'acculturation' and 'interpersonal osmosis'.

These fundamental themes are further explored in other essays. Timothy M. Shaw, discussing the elusiveness of development and welfare, endorses the view 'that the Third World is the future international order' (p. 96) and that it has, realistically, assessed its chances of success as being dependent on both the co-operation of the still-dominant great powers and even more so on continuous Third World unity. Douglas M. Johnston examines theories of justice in moral, political and legal philosophy from Socrates to John Rawls in search of the foundations of justice in international law. He cautions against attempts to further cultural convergence by abandoning entirely the traditions of natural right and positive law as these doctrines 'have contributed too much to the ideals of liberty and security' (p. 134), and advocates an integration rather than a selection of values. M. D. Copithorne, writing on 'The structural law of the International Human Welfare system', critically reviews the constitutive aspects of the work of the United Nations and of the specialized agencies in the field of human welfare and predicts that uncertainties as to values and as to the suitability of existing institutions and mechanisms to face insistent demands for change will hasten the pace of structural change 'as the world community seeks to pursue human welfare on a universal scale' (p. 171). Erik Suy reflects on 'Innovations in International Law-Making Processes' and particularly on law-making by the General Assembly and the consensus technique.

The first essay in Part Two is a sketch by R. St. J. Macdonald of the protection and promotion of human rights by the United Nations. It deals *inter alia* with two crucial questions, one organizational the other substantive, which have divided opinions in recent years: the hitherto unsuccessful attempt to establish the new post of a High Commissioner for Human Rights and the battle over priorities. Should equal attention be given to all categories of human rights, as is argued by many developed States, or should a higher priority be accorded to the promotion of economic, social and cultural rights as is demanded by most developing countries? Is the new international economic order to be given priority as a precondition for the effective advancement of human rights or to be 'conceded' by developed States as reward for good behaviour by developing States with respect to civil and political rights? Bertold Brecht tersely says: 'Zuerst kommt das Fressen, dann kommt die Moral' (first comes the food and then morality).

The next chapter is entitled 'International Law and the Control of Barbarism'. L. C. Green, writing *cum ira et studio*, traces the treatment of barbarism—which, incidentally, remains undefined—back to the writings of Vitoria on the rights of Spain *vis-à-vis* the Indians in conquered territories, and shows that classicists such as Grotius, Pufendorf and Vattel all supported a right of intervention in the name of humanity. He admits, however, that there is little unambiguous State practice until the Second World War. In the same vein this writer deplores that the distinction between civilized and uncivilized States has now been abandoned, and reviews numerous instances of barbarism such as torture, apartheid and the activities of mercenaries, concluding that universal attempts to control these outrages have not been successful because of conflicting political ideologies.

'Human Development through Education' is the subject of J. R. Kidd's contribution, followed by a pugnacious piece by Annemarie Jacomy-Millette entitled 'La Femme Nouvelle dans la vie sociale internationale des années 1970'. It is an impassioned *cri de cœur* for equal rights of women in every field of human activity and against any discrimination. She denounces rationalizations of female inequality as well as their past and present advocates and asserts that it was and is human society and the allocation of roles to the sexes which has had this disastrously discriminating effect. However, from such commonplaces she moves on to outline the various legislative activities of the organs of the United Nations and of specialized agencies and regional organizations concerned with the promotion and protection of women's rights.

Chapters by John Hucker on 'Migration and Resettlement under International Law', by



John Claydon on the 'International Protection of the Welfare of Migrant Workers' and by Claude C. Emanuelli on 'La protection internationale du voyageur non-privilegié' complete the second part of the book.

Louis Sabourin's 'International Economic Development: Theories, Methods and Prospects' leads into Part Three. The 'north-south dialogue' is the expression of a new consciousness of profound inequalities in the world and not merely a new technique in international relations. A brief characterization of the various dogmatic approaches to economic development brings this writer to the conclusion that the classical and neo-classical authors can no longer provide guidance. They based their development policies on conditions prevalent in Europe and it was only Marx who realized that the growth of trade represented an extension of capitalist exploitation of poor countries which, as it so happened, led to a deterioration in their commodity trading terms, leaving them far behind the industrialized nations. Only concerted efforts by means of planning, aid, investment and trade and carried by a common commitment to the development of the Third World could bring about the much-needed structural changes. Ivan Bernier examines patterns and modes of such co-operation and finds that collective action by developing States, whether in conflict or concertation with developed States, appears to be the most favoured pattern today.

More technical questions and the essential elements of a new international economic order are dealt with in successive chapters. Ernst-U. Petersmann writes on its 'Principles, Politics and International Law'; J. S. Stanford on 'International Law and Foreign Investment'; Robert Martin and Lars Osberg on 'Producer Cartels: Trade Unions of the Third World', Robert W. Cox on 'Labour and Employment in the Late Twentieth Century'; and Edgar Gold on 'The International Transfer and Promotion of Technology'.

Part Four of the book groups together a number of essays on a variety of interesting but rather recondite topics. They concern: 'Nation, City and the World Community: A Demographic Perspective' by Nathan Keyfitz; 'The Legal Factor in the Food-Population Question' by Mary Ellen Caldwell; 'Public Health and the Human Environment' by Peter Ruderman; 'Energy and International Economic Welfare' by D. W. Fulford and Robert G. Blackburn; 'The Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders' by D. Martin Low; and, finally, 'Organised Responses to Natural Disasters' by J. W. Samuels.

This monumental book exhibits a remarkably courageous effort to confront a broad spectrum of issues. It is essentially concerned with objectives, values and policies rather than legal instruments. Some pictures in the collection are brilliantly concise, others perplex through a blurring vagueness. Occasional discursiveness and verbosity can perhaps be explained by reference to the very concept of human welfare which is not an absolute but a historically conditioned notion as well as by the fact that the book constitutes an appeal to reluctantly enlightened élites which require some persuasion. This evocative and thought-provoking set of essays indicates a growing awareness that the absence of global welfare may lead to global warfare. Its only serious weakness is the lack of any contribution by a Third World writer, as if thinking, and writing too, were a kind of reserved domain or monopolized commodity of 'northern' writers.

FRIEDL WEISS

*L'Estoppel en droit international public. Précédé d'un aperçu de la théorie de l'estoppel en droit anglais.* By ANTOINE MARTIN. Paris: Éditions A. Pedone, 1979. xvi + 384 pp. 100 Fr.

At present, international law finds itself armed with a rather bewildering array of consensual and quasi-consensual devices, by no means always clearly distinguished from one another: for example, prescription, consolidation, acquiescence, protest, waiver, recognition (in its various forms), the binding effect of unilateral acts, opposability, and the list is certainly not complete. Writers have tended either to treat this spectrum of techniques as founded on very general notions of good faith and consent (so that the categories may not



be clearly separated), or to treat them as specialized concepts, in principle distinct, each subject to its own reasonably precise regime of rules.

In his very thorough treatment of estoppel in international law, it is quite clear that M. Martin very much favours the latter approach. His thesis is that international law has 'received' or 'adopted' the basic common law conception of estoppel more or less *en bloc*, with its precise requirements of clarity of representation, reliance and detriment. He contrasts with this narrow view, and rejects, the idea (wittily, if rather prejudicially described as the 'ersatz' view of estoppel (p. 221)) that estoppel is only a rather specialized application of the principle of good faith, preventing States from approbating and reprobating in respect of a particular claim or situation. If his argument could be established, it would be a remarkable example of the importation into international law of a particular municipal rule (which is not, as M. Martin makes clear, as such a 'general principle of law' (pp. 219-40)).

He begins with a textbook account of the English common law institution (pp. 7-62), including, briefly, promissory estoppel, issue estoppel and estoppel *per rem judicatam*. (Regrettably, not all the textbooks are up to date.) His central interest is, however, with the basic estoppel by representation. The position of promissory estoppel, in international no less than in English law, is uncertain (pp. 29-37, 258), and *res judicata* and issue estoppel in international law depend upon the very different context and ground-rules of international adjudication (pp. 247-53). (Following Bowett, he does, however, argue briefly for issue estoppel in international law, while excluding it from the scope of the book (pp. 250-3).)

There follows, in Part II, a description of the pleadings, case-law and doctrine by which estoppel came to be received in international law. In the author's view, that reception derived from the frequency with which common lawyers invoked estoppel in argument before international tribunals, argument which was taken up in the judgments of the tribunals (although in a subsidiary way or to be rejected on the facts). This pleading habit was adopted by the civil lawyers, and doctrine followed in the wake of consistent pleading and judicial practice. Moreover, as estoppel has gained general acceptance, courts have tended to formulate its requirements in the classical, restrictive terms of English law, and again, doctrine has followed. The result is that 'le droit international a reçu l'institution de l'estoppel by representation de la common law, puisqu'il en a retenu les éléments essentiels en les transposant de l'ordre interne dans l'ordre international et en les adaptant aux situations visées' (pp. 214-15).

This basic conclusion is then subjected to two lines of inquiry: the first, an examination of the theoretical basis of the reception of estoppel in international law; the second, an inquiry into the precise elements of the doctrine so received. The author argues that estoppel owes its international law origins to a form of custom, rather than to judicial decision, doctrine or general principles of law; that is, to what he terms 'customary case law' (pp. 240-6). The arguments of counsel before international tribunals are still State practice, and the consistent use of estoppel arguments, fortified by adoption (even if only *obiter* or in a subsidiary way) by tribunals, have led to the acceptance of estoppel as a customary rule.

It is, however, difficult to accept this argument. The notion of 'customary case law' seems to involve, at least, a confusion or conflation of elements in the formation of international law which are, and ought to be, distinct. Counsel for a State before an international tribunal may well be agents of the State for the purpose of admissions, declarations and the like (cf. p. 284), but it is difficult to accept that their juridical arguments are an autonomous form of custom or State practice. They are, after all, attempting to persuade a tribunal whose decision is only a 'subsidiary' source of general international law. It would be odd if argument, which is subordinate to decision, could somehow rise above the latter in its formal status as a law-creating agency. What, on such a hypothesis, are we to make of conflicting or alternative arguments for a State party (though such arguments are a perfectly acceptable forensic technique)?

The truth is that notions such as estoppel are more likely to come into international law through processes of judicial decision, by extension of or analogy from accepted general

principles of law (such as good faith or consent) than through the adoption by custom of a particular municipal institution. The author's argument unnecessarily devalues the 'subsidiary sources' of international law mentioned in Article 38 (1) (d) of the Statute of the International Court; and if the use of estoppel in the case-law so far has tended to be tentative and subordinate rather than clear and direct, then that may only be a fair reflection of its present status.

This is not to say that a reasonably precise rule of estoppel may not exist or is not desirable. The tendency of the different consensual techniques to merge into one another leads to imprecision of argument and sloppiness of thought. In his final section (pp. 255-330) dealing with the elements of estoppel in international law, the author argues strongly for such precise rules here; but in keeping with his general thesis he tends to do so more by relying on the common law analogy than by independent analysis of the international case-law. There is frequent reference back to the earlier descriptive account of that case-law, but a more integrated analysis might have been preferable.

These criticisms notwithstanding, this is a thorough, well-written, thought-provoking book. It includes a sparkling preface by Virally (pp. vii-xi), who points out that a fully satisfactory account would require consideration of fundamental questions, including, I would suggest, the relations between estoppel and other, more-or-less cognate, concepts. The *Nuclear Tests* case, for example, carries clear implications for this topic, but is only briefly mentioned (cf. p. 258 n. 7). In the *Santa Isabel* case (1926) a speech by a Mexican general was held not to create an estoppel (pp. 145-6). If, one cannot help asking, 'mere words uttered at a banquet which was not official' cannot have 'consequences so transcendental', on what basis is one to distinguish mere words at a press conference?

JAMES CRAWFORD

*A Current Bibliography of International Law.* By J. G. MERRILLS. London: Butterworths, 1978. xx + 277 pp. £18.50.

Your reviewer had hoped that the paper shortage which began a few years ago would prove to be the greatest boon to scholarship since Gutenberg. Alas, it was not to be, and any help in finding our way through the forest of writings on international law is most welcome. Mr. Merrills and his publishers are to be congratulated on producing this useful research tool.

As its title indicates, the book concentrates on the literature (mainly periodical) of the 1960s and 1970s, with particular emphasis on the latter. Each entry is, like Dias's *Bibliography of Jurisprudence* from the same stable, accompanied by a brief, and generally useful, outline of the content of the book or article. There is also an index of authors: its utility is, however, somewhat marred by the listing, in a number of cases, of the same person as if he were two distinct individuals (e.g. Akehurst, Churchill, d'Amato and your reviewer).

The limited coverage of the work *ratione temporis* was presumably dictated largely by considerations of cost, but is nevertheless unfortunate. Although it is true that there have been important changes in international law over the last two decades, the fact is that, in some fields at least, much of the most valuable writing is pre-1960—for example, on the subject of the sources of international law.

A further serious deficiency is the confining of the bibliography to works in English, a fact which invites unfavourable comparison with works like Delupis's *Bibliography of International Law*. Any self-respecting international lawyer must be able to read at least French in addition to English, and room could have been made for writings in the former language by the omission of references to some other articles of very dubious utility. It may be true that students are reluctant to look at materials in foreign languages; but graduate students should be encouraged (not to say obliged) to do so, while undergraduates will normally work to the reading lists of their own teachers, and not resort to this bibliography (still less buy it at £18.50).

It is to be hoped that the author will increase the coverage of this work in future editions.

MAURICE MENDELSON

*International Law of the Sea: a Bibliography.* By NIKOS PAPADAKIS. Alphen aan den Rijn: Sijthoff and Noordhoff, 1980. xvii + 457 pp. U.S. \$85.00.

The 1967 speech by Pardo to the U.N. General Assembly and the establishment of U.N.C.L.O.S. III produced an avalanche of literature on the law of the sea. These works, not always written by lawyers and varying in quality, continue to increase at a phenomenal rate. In fact, the law of the sea has become one of the dominant themes in the writings of international lawyers.

There already exists a large number of bibliographies which cover the subject. The author himself quotes over 100. However, few are adequate and most are outdated. Clearly there is a need for a comprehensive and representative bibliography to guide the interested reader through the wealth of literature available.

The author has divided the over 4,500 works classified into six parts. Part I deals with the introductory and general works on the law of the sea. It also contains sections dealing with the three U.N. Conferences on the law of the sea. Maritime jurisdiction is dealt with in Part II. Apart from the usual sections on maritime zones, there are useful sections on the delimitation of the territorial sea and continental shelf, the Panama and Suez Canals, the North Sea and Aegean Sea disputes. Other sections deal with emerging concepts of the law of the sea such as enclosed and semi-enclosed seas. The third Part refers to the legal regime of the sea bed and subsoil beyond the limits of national jurisdiction. The vast field of marine resources, living and non-living, is dealt with under Part IV, which includes two useful sections on the E.E.C. fisheries policy and the current fisheries negotiations at the Third United Nations Conference on the Law of the Sea. The next two Parts deal comprehensively with the protection and preservation of the marine environment, and marine scientific research. The military uses of the sea are covered by Part VII; the sections on the Mediterranean Sea and the Indian Ocean are of particular interest. Part VIII is a commendable innovation. Entitled 'Ocean Policy Making', it is divided into three broad sections. The first consists of a classification of material dealing with the maritime policies of seventeen States. The second deals with regional approaches to the law of the sea. The last collects works which give the developing States' perspective to the law of the sea. The final Part concerns the settlement of disputes.

An accompanying appendix covers the previous law of the sea bibliographies. The excellent subject index is complemented by an index of authors and another dealing with general documents and conference resolutions and reports.

The author readily admits that his bibliography is not exhaustive. This is understandable in view of the abundance of material available. Despite this, some omissions are difficult to excuse. To mention only two: I. Brownlie, 'Survey of International Customary Rules of International Environmental Protection' (*Natural Resources Journal*, 13 (1973), pp. 179-89) and an excellent series of articles by U. Jenisch on U.N.C.L.O.S. III found in *Aussenpolitik* (Stuttgart). The bibliography only covers works in English and French. Also disappointing is the absence of a section specifically dedicated to works dealing with the role of the International Court in the law of the sea. A number of excellent articles written on this topic have not even been inserted (e.g. P. Mengozzi, 'The International Court of Justice, the United Nations Conference and the Law of the Sea' in the *Italian Yearbook of International Law*, 3 (1977), pp. 92-114). Notwithstanding these limitations, this bibliography supersedes its predecessors in many respects. It treats comprehensively in one handy volume most areas of the law of the sea. The indexes make each reference easily accessible. It will prove to be invaluable not only to researchers, but also to practitioners,



government officials and students. Moreover, the bibliography can be updated by supplementing it with the excellent, regular U.N. publication entitled *The Sea: A Select Bibliography on the Legal, Political, Economic and Technological Aspects* issued as part of the Dag Hammarskjöld Library.

DAVID J. ATTARD

*The Latent Power of Culture and the International Judge.* By LYNDEL V. PROTT. Abingdon: Professional Books, 1979. xxi + 250 pp. (including bibliography and index).

This is the English version of a book originally published in German and reviewed in a previous volume of this *Year Book* (vol. 48 (1976-7), p. 434). Using a combination of sociological and philosophical approaches the author devotes the major part of the work to examining five fundamental issues concerning the Court and its work. These are: how the Court functions compared to other institutions, how the internal relationships within the Court affect its activity, how the Court projects its role to others, what methods of reasoning the Court employs and what changes can be seen or anticipated in the Court's style of judgment. The results of these studies are then used as the basis for a final chapter in which the pronouncements of individual members of the Court are examined with a view to both identifying the influence of national legal systems and considering the feasibility of a truly international legal culture.

There could be no clearer demonstration of the contribution which other disciplines can make to the understanding of law and legal institutions, and the student of the Court will find Dr. Prott's book a richly rewarding experience. Though space precludes an account of the many insights she provides, two comments about the author's selection of material and her approach to it may be made.

First, the reader is often struck by the emphasis on the formal, as opposed to the substantive, aspects of the Court's work. Thus, for example, a good deal of attention is paid to the question of which judges regularly vote together, but relatively little to the issues on which they agree or divide. This is a point which those who seek to build on Dr. Prott's work will surely wish to develop. For whether one's concern is with the complexity of a particular judge's approach to international law, or the future direction of the Court as a whole, analysis and assessment of the substantive record, the traditional function of the legal scholar, have a value which must not be underestimated.

Secondly, the author's discussion of the performance and dynamics of the Court focuses upon the *South West Africa* cases of 1962 and 1966, with additional references to subsequent and contemporaneous cases. This orientation is to be explained by the origin of the book in the author's doctoral thesis. It does not detract from its permanent value as a study of the Court and its members, but many of the points made in the text can now be reviewed in the light of the evidence provided by the Court's more recent jurisprudence, particularly the advisory opinion in the *Western Sahara* case, on which Dr. Prott has some further observations in her contribution to Perelman and Foriers's, *La Motivation des décisions de justice* (1978).

A number of points of detail call for comment. There are several misprints, including the misspelling of the names of Judge Koretsky and Judge Urrutia Holguín (p. 58). The contrast drawn between the views of Falk and Fitzmaurice (p. 79) is not appropriate in the context. And the statement that in England every member of the legal profession belongs to one of the Inns of Court (p. 34) is an obvious error. These are, however, minor blemishes in a provocative and original work which also includes an excellent bibliography.

J. G. MERRILLS

*Human Rights: Thirty Years after the Universal Declaration.* Edited by B. G. RAMCHARAN. The Hague, Boston and London: Martinus Nijhoff, 1979. xi + 274 pp.

This commemorative volume on the occasion of the thirtieth anniversary of the Universal Declaration of Human Rights contains, like other *Festschriften*, a number of essays by learned friends of the devotee. An introductory message by Sean MacBride S.C. conveys the general spirit of the undertaking: although the thirty years since the proclamation of the Universal Declaration have witnessed significant progress in the elaboration of universally accepted standards on human rights, and in the development of measures and methods for their implementation, 'the human rights situation today remains a tragic one'. It is this finely balanced analysis, equidistant between euphoria and complacency, which pervades all contributions to this volume and which makes for both scholarly reliability and a somewhat colourless and detached account. E. Luard in his foreword stresses the point that international concern for Human Rights should now be concentrated on means of more effective implementation and appropriate machinery to secure respect for human rights. However, his implicit assertion that the earlier phase of standard setting by means of the Universal Declaration and the U.N. Covenants has come to an end appears to overlook the profound substantive disagreements on the question of the exhaustiveness of those standards, as well as priorities.

Part One, entitled 'The Contribution of the Universal Declaration', consists of a demonstration by Professor J. Humphrey that the international standard set by the Universal Declaration, once thought of as only possessing high moral and political authority, has passed into the body of national constitutions and legislation as well as into that of customary international law.

Part Two, on 'Human Rights Today', comprises a theoretical examination of 'The Evolving Concept of Human Rights in Western, Socialist and Third World Approaches' by H. Gros Espiell and a practical account of 'Human Rights in Foreign Policy' by J. Freymond. Espiell warns of the pitfalls of classifying human rights approaches according to groups of States while at the same time expressing the hope that further and increased approximation and interpenetration of various trends of thought might still be accommodated within the notion of the equality and dignity of all men provided despondent retreat into sceptical relativism can be avoided. His concept of inalienable human rights is a reminder of the natural-law origin of human rights. It is doubtful, however, whether it can usefully be resorted to in order to overcome differences of perception which are due to economic and ideological differences in present-day societies and which, outside Europe, owe little if anything to the historic incidence of secularized and rationalized divine rights of man as was the case in Europe. Freymond refers to the failure of both the Helsinki and Belgrade Conferences to tackle the question of the international protection of human rights to show that there is widespread resistance of governments to the idea of international control. He, consequently, welcomes the human rights initiative of the Carter Administration which has made the protection of human rights through diplomatic action an objective of American foreign policy. While conceding that the protection of human rights is ultimately not the affair of the government but of the international community, he concludes that 'the protection of human rights has thus become one of the essential conditions for the preservation or the re-establishment of peace' and that 'on this point the Carter Administration, by making it one of the mainstays of its foreign policy, has shown the way which must be followed'.

Part Three of the book deals with a variety of topics under the title 'The Future'. Dr. Van Boven discusses 'U.N. Policies and Strategies'. He is scornful of the idea that the securing of political and civil rights as in Western style democracies will 'as if by magic, lead the Third World out of underdevelopment' and advocates a global and structural approach. Such an approach is exemplified by the concepts enshrined in the General Assembly Resolution 32/130 adopted at its thirty-second session which affirms the indivisibility and

interdependence of all human rights, civil and political as well as economic, social and cultural. Dr. Ramcharan examines future perspectives of standard setting. He is critical of the present system as operating 'on too ad hoc a basis' and emphasizes the need 'for better planning and more careful consideration of priorities' as well as for 'more flexible forms of standard setting' by means of, for example, 'recommendations, bodies of principles, model codes and declarations, especially when standards are being elaborated to spell out rights contained in existing instruments'. M. Moskovitz, writing on 'Implementing Human Rights: present status and future prospects', turns his attention to the 'spirit of revisionism' in the United Nations. An extensive review of the debates in the Third Committee of the thirty-second session of the General Assembly (1977) which led to the adoption of Resolution 32/130 on 'Alternative Approaches and Ways and Means within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms' casts considerable doubt on the very notion of international implementation and calls for a more realistic 'integrated approach'. Dr. Kamleshwar Das offers 'Some Reflections on Implementing Human Rights' suggesting for discussion a protocol of a general nature for eventual adoption by the General Assembly 'consisting of a scheme whereby states may accept certain minimum undertakings and optionally adhere to greater commitments'. This is followed by another essay by Dr. Ramcharan on 'Implementing the International Covenants' in which the workings and shortcomings of the implementation procedures are critically examined. A contribution of the U.N.E.S.C.O. Secretariat entitled 'UNESCO and the Challenges of Today and Tomorrow: universal affirmation of human rights' insists on the necessity of effective as opposed to an assumed universality of human rights. Dr. Nicolas Valticos writes about 'The Role of the ILO: present action and future perspective', reminding the reader that the implementation of human rights owes a great deal to the example set by the I.L.O. system of supervision. A study of 'The Role of Regional, National and Local Institutions: future perspectives' by Dr. Ramcharan and an aperçu of informal ways of 'progressive transnational promotion of human rights' by Professor Antonio Cassese conclude the narrative part of the book. An appendix containing the Universal Declaration of Human Rights and an index complete the volume.

This book describes achievements and outlines improvements. However, it attempts to establish a 'new realism' with the vocabulary and intonation of disappointed idealism. The fundamental dilemma involved in postulating 'global standards' for a variety of 'regional values' can be neither conjured away nor deferred. Transformation of traditional concepts of human rights to accommodate a wider substratum of humanity must now be undertaken by the use of all legal techniques available in international law. This is the message of this book.

FRIEDL WEISS

*La Succession d'organisations internationales en Afrique.* By RAYMOND RANJEVA. Paris: Éditions A. Pedone, 1978. xiv + 418 pp. (including bibliography). 100 Fr.

Unlike State succession, the question of succession by international organizations has received relatively little scholarly attention, so that with the notable exception of the voluminous discussion of the South-West Africa/Namibia dispute, the legal complexities of institutional succession remain largely unexplored. This is surprising since, as the author of this book demonstrates, the substitution of one international organization for another is now sufficiently common to pose recurrent problems. In focusing his work on African organizations Dr. Ranjeva has sought both to describe the circumstances and legal implications of succession in a variety of political, economic and technical institutions in the region and to identify their contribution to a general theory of succession by international organizations.

The whole enterprise is most thoughtfully and competently done, with an account of the



political background to each case and a well-documented discussion of how such issues as the transference of functions to the successor organization, its succession to treaties and the disposal of its predecessor's assets were resolved. Thus, whilst it is clear that the decisive events of the last twenty-five years have made an impact on institutional structures on the African continent that is in many ways unique, there is much to recommend this imaginative study to everyone with an interest in the law of international organizations.

The extensive bibliography contains references to the leading works in French, English and Italian, as well as to a selection of documents and official publications and to the relevant jurisprudence of the World Court. In accordance with the usual practice there is an analytical table of contents, but no index.

J. G. MERRILLS

*Sozialistisches Voelkerrecht? Darstellung-Analyse-Wertung der sowjet-marxistischen Theorie vom Voelkerrecht 'neuen Typs'.* (Max Planck Institut für ausländisches öffentliches Recht und Völkerrecht. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol. 73.) By THEODOR SCHWEISFURTH. Berlin, Heidelberg and New York: Springer-Verlag, 1979. xiv + 615 pp. DM. 108.

Since the intervention of the U.S.S.R. and other Warsaw Pact States in the C.S.S.R. in 1968 the so-called 'Brezhnev doctrine of the limited sovereignty of socialist States' is a prominent feature in the western perception of Soviet foreign policy versus other socialist States. However, as the author of the book in question points out correctly, the doctrine of limited sovereignty was neither invented on the spot nor was it an isolated phenomenon of the Soviet theory of foreign policy and international law: it relied on the concept of a socialist international law, discussed and developed since the Russian revolution to govern the relationship between socialist countries.

The author adopts a very thorough approach to the problem of the existence and scope of socialist international law: in the first part of his study he describes carefully the Soviet-Marxist theory of socialist international law, limiting himself to the presentation of the Soviet view. In his description he covers not only the whole period of Soviet legal thought concerned with the subject, but provides also a very representative picture of the various and changing opinions among Soviet international lawyers. His account is a valuable description of the process by which the Marxist-Leninist postulate of socialist internationalism developed into an international law principle in Soviet theory.

The analysis, which follows the descriptive part, is based on a very sound maxim: the author limits himself to those analytical categories on which the Soviet theory bases itself. In the normative field, Soviet theory postulates two sources of socialist international law, international treaty law and international customary law. Following these categories, the author examines the possible legal bases: the Charter of the United Nations, the Warsaw Treaty, the Comecon Statute, bilateral treaties and customary law. He comes to the conclusion that the relationship between the socialist States is governed by universal international law and the principle of socialist internationalism, in so far as it is incorporated in bilateral treaties. The most interesting result of his analysis is the fact that no treaty provision stating the principle of socialist internationalism provides a right to give help to another socialist State without its consent. If the Soviet international lawyers are arguing for the existence of such a right, they have no basis in treaty and customary law.

Using the categories of Soviet theory, the author does not confine his analysis to normative considerations, but examines also the sociological arguments put forward by Soviet international lawyers in accordance with the Marxist-Leninist doctrine. In his view there is a severe flaw in the sociological conception of the Soviet doctrine: whereas he agrees that the content of State wills is influenced by the various social groups within the State, he considers that it is still necessary to examine the treaty norms in question. It is not

sufficient to state that the State wills in socialist systems are determined by the socialist structure of their societies in order to establish the existence of a new type of international law: one must examine the relevant provisions of treaty and customary law.

He concludes from his normative and sociological analyses that a new type of socialist international law has not come into existence and that only a few new principles of socialist internationalism have been added to universal international law through bilateral treaties between the socialist States. In the evaluation of his findings the author expresses the view that the doctrine of socialist international law tries to legitimize the policy of the Soviet Union without a solid normative and sociological basis.

This scholarly study is a very useful source for the understanding both of the theory of socialist international law and of the Soviet concept of universal international law. The only regrettable fact is the confinement of the study to the Soviet view of socialist international law, whereas the subject demands at least a short review of legal opinions in the other socialist States.

ALBERT SCHAEFFER

*La Protezione Internazionale del Mare contro l'Inquinamento.* Compiled and edited by VINCENZO STARACE and ANTONIO FILIPPO PANZERA. Milan: Dott. A. Giuffrè Editore, 1979. xi + 535 pp. L. 15.000.

This work contains a collection and classification of documents, mainly in Italian, relating to the protection of the marine environment. The material is comprehensive and presented in one handy volume. It includes useful editorial notes, which contain bibliographical references and indicate where the reader can locate the English or French version of the particular document. An excellent analytical index permits the reader to examine the collected documents comparatively.

The need for international co-operation to protect the marine environment is of relatively recent origins. The last ten years have, however, seen a dramatic rise in the number of treaties aimed at protecting the already polluted oceans. These instruments can be 'universal' in character (for example, the International Convention for the Prevention of Pollution from Ships, London, 2 November 1973), or 'regional' (for example, the Convention for the Protection of the Mediterranean Sea against Pollution, Barcelona, 16 February 1976). The editors have sensibly included numerous acts adopted by international or regional organizations and conferences.

This low-cost collection of 'raw' documents clearly has its value, particularly to researchers who do not have a large library at their disposal. Unfortunately, the use of Italian texts will probably limit its appeal to Anglo-Saxon readers.

DAVID J. ATTARD

*Nationality and Statelessness in International Law.* By P. WEIS. Foreword by SIR HERSCH LAUTERPACHT. 2nd edition. Alphen aan den Rijn: Sijthoff and Noordhoff, 1979. xlii + 337 pp. (including documentary appendices and index). Dfl. 125.

This book was the first monograph on the public international law of nationality to appear in English and in the foreword (which is reprinted) Sir Hersch Lauterpacht described it as 'the most comprehensive modern treatment of the law of nationality that has appeared so far in the English language'. The first edition, published in 1956, was well received and has long been out of print. The publication of the study by Jonkheer van Panhuys, *The Role of Nationality in International Law* (1959), did not make the work of Weis redundant, since the treatment is on rather different lines.

The contribution of Dr. Weis has now appeared in a second edition. The material has been brought up to date in various ways and certain sections have been given a substantial reworking: as, for example, the examination of denationalization in chapter 10. However,

the revision is limited in scale and the general conception and the conclusions (except in detail) remain the same.

Given the scholarly method and the careful organization of the material, the work must retain its place as a classic statement. However, doubts remain and these relate to the fundamental assumptions made by the author. The most serious doubt is provoked by the conservative and unsatisfactory nature of the approach of Dr. Weis to the relation of municipal law and international law in the sphere of nationality. In accordance with this approach the decision in the *Nottebohm* case is received with noticeable reserve. In this Dr. Weis is not alone, of course, and each is entitled to his own preference. However, it is unfortunate that Dr. Weis, and others, fail to grapple with the 'structural' problems raised by *Nottebohm* (and by many other issues). The 'structural' problem is, quite simply, that when rules of international law depend upon and employ quantities of municipal law, those quantities must not rest upon ephemeral or abusive creations. This general question has been examined at length by the present writer in this *Year Book*, vol. 39 (1963), pp. 284-364. The questions raised by *Nottebohm* cannot be reduced to the particular issues of the role of naturalization or the matter of opposability in the decision itself. As in the first edition, Dr. Weis (pp. 65-6) quotes Oppenheim for the proposition that 'it is not for International Law but for Municipal Law to determine who is, and who is not, to be considered a subject' (8th edition, vol. 1, p. 643). This statement appeared in the first edition of Oppenheim in a significantly different context (vol. 1, pp. 348-9) and was not intended to have the consequences now ascribed to the words. The matter was carefully explained in this *Year Book*, as above, at p. 289.

It is noteworthy that the positions taken by Dr. Weis on the relations between municipal law (and therefore the acts of individual States) and international law are rather less than consistent. Thus it is observed (at p. 125) that denationalization is subject to the principle of non-discrimination. This view does not sit happily with the freedom ascribed to States in other contexts. In general it is fair to say that there is an underlying tension between the emphasis placed by the author upon considerations of human rights (and the status of the individual) and the general tendency to play up the role of domestic law in matters of nationality.

The new edition is notable for two omissions. No reference is made to Professor Parry's massive study, *Nationality and Citizenship Laws of the Commonwealth and the Republic of Ireland*, of which the principal volume appeared in 1957. In particular, Part I of this volume is an item of quality and general significance, and indeed this is true of the whole work. A further omission is the decision of the Danish Supreme Court in the *Schmeichler-Pagh* case (*Journal du droit international*, 92 (1965), p. 689), which, incidentally, is also ignored by O'Connell, *International Law* (2nd edn., 1970).

IAN BROWNLIE

*The International Judicial Process: Public and Private.* By J. GILLIS WETTER. Dobbs Ferry, New York: Oceana Publications, Inc., 1979. 5 vols. xxxviii+617 pp.; xv+622 pp.; x+470 pp.; ix+550 pp.; xi+593 pp. (including table of legislation, table of cases and index).

This remarkable publication, by a well-known practitioner, constitutes more or less an encyclopaedia of the law of arbitration, in the context of both public international law and commercial law. The subject is a large one and these volumes may be said to reflect its extent and significance. The compilation is documentary and for the most part the material is left to speak for itself. Most of the chapters are concerned with commercial arbitration, its institutions, the sets of rules and the questions of procedure. A great quantity of information is presented and it is unlikely that such a comprehensive picture is to be found elsewhere. Particular chapters are devoted to the multilateral conventions and to arbitration clauses.

The volumes contain a number of chapters which focus upon matters of special



interest to the pure international lawyer. Chapter I, of some 400 pages, is concerned with inter-State arbitration, with reference to the *Alabama* claims, the *Island of Palmas* case, the *Rann of Kutch* case, and the *Beagle Channel* case. The documentation of the first of these is imaginatively done and the result is of considerable value. The *Beagle Channel* case, and the diplomatic aftermath, ending in the arrangements for mediation by His Holiness the Pope in 1979, are also presented extensively.

Four other chapters are devoted to issues primarily of interest to public international lawyers. Thus chapter II provides information concerning the *Aramco*, *British Petroleum* and *Texaco* awards. Chapter VII includes materials on the problems of the revision and reopening of awards. Of great interest is chapter VIII which provides a massive study of the Venezuela-Guyana boundary dispute. The story is told very fully and there is a large excursus on the law relating to the nullity of international arbitral awards. Chapter XV gives an account of the arbitration rules of public international law: the Hague Conventions of 1899 and 1907 and the work of the International Law Commission. This chapter also reproduces excerpts from the excellent Report of Von Mangoldt contained in a Symposium organized by the Max Planck Institute: see *Judicial Settlement of International Disputes*, edited by Mosler and Bernhardt (1974).

Valuable though the presentation is, certain points evoke reservations. In the introduction to chapter I the author states that 'one of the main aims of this book is to demonstrate the usefulness of creating, in scholarship and practice, a cross-fertilisation between public international law cases and commercial arbitrations'. This aim is hardly fulfilled—but nothing turns on this, since the areas of possible cross-fertilization are in fact rather limited. Indeed, a more substantial criticism would be the assumption that international law arbitrations and commercial arbitrations are really alike. A connected oddity is the annexation of 'international arbitration' and its apparent isolation from the general question of judicial settlement of international disputes. However, the work retains its value in spite of these solecisms. Dr. Wetter has performed an excellent service and his collection contains much that is not found, or not found so conveniently, in libraries, other than those of certain specialists and firms.

IAN BROWNLIE

*The International and National Protection of Movable Cultural Property: a Comparative Study.* By SHARON A. WILLIAMS. Dobbs Ferry, New York: Oceana Publications, Inc., 1978. xvii + 302 pp. (including index). \$35.

Professor Williams, in what is a pioneering and fascinating study, chronicles the depredation, pillage and desecration which the vanity, greed, deceit and cruelty of the human race has perpetrated on its cultural patrimony. Confronted with so many of mankind's worst traits it comes as no surprise to discover that this is an area where the prophylactic remedies of the law have for the most part failed miserably.

The author states that her object is to 'analyse and compare the past and present laws as they relate to the protection of cultural property in both peacetime and armed conflict' (p. 1). By cultural property is meant 'movable property which possesses a special value due to its prehistoric, historical, archaeological, ethnological, artistic or scientific importance', its value being assessed by reference to 'the property's importance to the cultural heritage of all peoples' (p. 2). Because movables are more easily taken as spoils of victory in wartime and constitute, in time of peace, the subject-matter of nearly all illicit trafficking in art, the book accords only minimal treatment to immovables. The chief example is 'Elginism', defined here as 'the uprooting of ancient monuments piece by piece or in their entirety and then exporting them under a guise of legality' (p. 9).

The organization of the book falls neatly into five parts. The opening chapter is a richly detailed account of the development of rules of international law for the protection of cultural property against its 'greatest threat', war; witness the nationalistic excesses of the Napoleonic period or the organized plundering of the Nazis. This is followed by an

examination of the protection afforded by present-day international conventions to cultural property in the event of armed conflict. The provisions of the U.N.E.S.C.O. sponsored Hague Convention of 1954 are closely analysed and the author makes a strong plea for the urgent extension of the Convention to armed conflicts of a non-international character.

The author then turns her attention to the international legal regime protecting cultural property in time of peace. Here, the problems are no longer those of plunder and pillage but the 'regulation of the international movement of art treasures' (p. 52). This involves the responsibility of a State for the protection of all cultural property situate within its territory, whether the property is there as a result of legal or illegal means. Attempts to secure recognition in this area of a concept of the common heritage of mankind, together with its corollary of international collaboration, have so far foundered on the rocks of State sovereignty. As the author indicates, this application of the common heritage concept differs fundamentally from its application to such areas as outer space or the deep-sea bed, in that property rights remain vested in individual States. Rather, the concept is to be seen in terms of the imposition upon States of a measure of responsibility for the preservation and protection of cultural property.

The penultimate chapter considers measures of protection on the domestic law plane. It starts by looking at judicial decisions on a number of familiar conflict-of-laws issues, including involuntary transfer of property and non-enforcement of foreign penal, revenue and other public laws, as a possible source of protection of cultural property. The remaining sections break newer ground. Professor Williams scrutinizes the export and import control laws governing cultural property in a number of jurisdictions and praises the approach followed by the United Kingdom—where there is no general legislative system of protection—as 'the most enlightened' (p. 114), for the reason that it recognizes that international trade in cultural property has 'greater cultural advantages than a stifled market' (p. 116). The author's perhaps too fulsome view is that the United Kingdom system for licensing exports under Export of Goods Control Orders (for which no source references are given) is 'used with a modicum of good sense . . .' (ibid.). She is critical of export laws which require licensing of dealers in antiquities, on the grounds that they constrict the legitimate flow of art to the international market and are relatively easy to circumvent. The necessary adjunct to export controls is the co-operation of importing States: in this respect the United States, as the largest market for stolen or illegally exported cultural property, is singled out for deserved criticism in respect of its *laissez-faire* policy. To combat the deficiencies of these control systems, Professor Williams puts forward some interesting suggestions. First, by simple self-regulation, ethical standards governing acquisition policies of museums and collectors could be raised significantly. Secondly, there is scope for international non-governmental organizations such as the International Council of Museums, to play a major role in influencing museums, collectively the largest market for cultural works.

The final chapter examines in detail international and regional attempts to protect cultural property by multilateral treaties and by means of recommendations and resolutions of U.N.E.S.C.O.

For the future, the author is not hopeful about the introduction of more effective legal mechanisms for protecting the world's cultural heritage. In the absence of visionary solutions such as the international dispersion of cultural property on a trusteeship basis from the art-rich to the art-poor States, the most that can be hoped for is an increase in cultural interchange in the form of loans and exhibitions.

Although nearly half the book comprises endnotes and appendices, Professor Williams has none the less managed to put across her vast specialist knowledge in a skilful and informative way while generally maintaining high standards of scholarship.

J. C. WOODLIFFE





## DECISIONS OF BRITISH COURTS DURING 1980 INVOLVING QUESTIONS OF PUBLIC INTERNATIONAL LAW\*

*Executive certification—questions of international fact unrelated to the diplomatic relations of the forum—interpretation of insurance policy—‘civil war’*

*Case No. 1. Spinney's (1948) Ltd. & Ors. v. Royal Insurance Co. Ltd.*, [1980] 1 Lloyd's Rep. 406, Mustill J. The plaintiffs owned property in Beirut which was looted during the disturbances in Lebanon in January 1976. They claimed under insurance policies which exempted, *inter alia*, loss caused directly or indirectly by 'civil war'. Thus one question was whether the events in Lebanon in January 1976 amounted to 'civil war' within the terms of the policies.

The plaintiffs argued that the term 'civil war' was to be given the meaning it has in international law, and that the court should seek a certificate from the Foreign Secretary as to whether the Lebanese conflict amounted to a 'civil war', either as defined in international law or generally. Mustill J. rightly rejected both arguments. He said:

There are, of course, well-recognised situations in which it is the practice of the Court to consult the Secretary of State, and on which his response is treated as conclusive. These are mainly, if not exclusively, cases in which the state of the United Kingdom's diplomatic relations forms an integral part of the issue in suit. Such cases include those where the issue is whether the United Kingdom recognises a person as a foreign sovereign, or whether the United Kingdom is at war with a foreign state, or whether the United Kingdom has recognised the existence of a state of belligerency between two foreign nations. By analogy, the Court will consult the executive of a foreign state where the issue is whether that state is at war with another . . .

The present case is not in this category. The issue is not whether the events in Lebanon were recognised by the United Kingdom as amounting to a civil war in the sense in which the term is used in Public International Law with the corollary that this country would, if the occasion had arisen, have accorded to the participants the rights and demanded of them the duties appropriate to belligerents. The question here is whether there was a civil war within the meaning of the policy. The two questions are not the same, and a pronouncement by the Secretary of State on one will not suffice to decide the other . . .

It is true that the Court will, on occasion, invite the opinion of the Secretary of State on questions of fact not directly connected with formal acts of recognition by the United Kingdom, and it might be said that since there is far from an abundance of evidence on what was happening in Lebanon at the relevant time, it would be sensible for the Court to avail itself of the Executive's own special sources of information in order to fill the gaps. I do not agree. When deciding whether the expected perils apply, the ascertainment of primary facts is only one step in the process. The real problem is to interpret what was happening, in the light of the words used in the policy. This would involve the Executive in expressing in public a formal opinion on the acts and motives of persons, groups and states,

many of whom are still engaged in the political life of this very sensitive area of the world. This might very well be a source of constraint and I do not consider that the Court should ask the Executive to engage upon such a task unless satisfied that some really solid benefit would ensue. I am far from satisfied of this. Answering the question would require the Secretary of State to ascertain the meaning of the words used in the policy, and unless the Court could be sure that the Secretary of State and the Court were adopting the same interpretation, the exercise would serve only to confuse: a difficulty recognised by the Secretary of State in [*Bantham's* case]. The only way to achieve this would be to inform the Secretary of State in advance what is meant by 'civil war', in the context of the policy. I do not consider it practical to define such an elusive term in the abstract, with sufficient precision to serve the purpose.<sup>1</sup>

There were at least three objections to the plaintiffs' argument. First, it is well established that terms in a contract have to be construed in that context, and may not bear the same technical legal meaning as they would in other contexts.<sup>2</sup> That being so, an executive certificate was, or at least risked being, beside the point. In any event, the case confirms the tendency to restrict executive certification to certain relatively formal contexts of diplomatic relations and recognition. The most satisfactory rationale for the executive certification rule is that, in these contexts, the question at issue (whether State A is recognized by the forum; whether B had diplomatic status at the relevant time) is not only peculiarly within the knowledge of the executive, but one where the executive's attitude really is—or at least is taken to be—dispositive.<sup>3</sup> Neither justification applied here. But thirdly (a point that Mustill J. did not need to make), the term 'civil war' is not as such a term of international legal art. It is true that in certain (in practice, rare) cases a civil war may involve questions of recognition of belligerency, but this is not an automatic consequence of 'civil war'; nor does it apply, even potentially, to all civil wars, as the additional, poorly defined, category of 'insurgency' demonstrates.<sup>4</sup> On this ground also the plaintiff's argument was misconceived.

In the event, after an interesting account of the Lebanese crisis,<sup>5</sup> Mustill J. held that the circumstances did not disclose a 'civil war', but that the plaintiffs could not show that their loss had not resulted from 'usurped power' or 'civil commotion' within the meaning of a further exemption in the policies.<sup>6</sup>

<sup>1</sup> [1980] 1 Lloyd's Rep. at p. 426. Cf. *ibid.*, p. 429: 'The words under construction are to be given their ordinary business meaning, which is not necessarily the same as the one which they bear in Public International Law. The statements of jurists are a useful source of insights, but they do not provide a direct solution.'

<sup>2</sup> Mustill J. relied on *Kawasaki Kisen Kaisha Ltd. v. Bantham Steamship Co. Ltd.*, [1939] 2 K.B. 544; *Luigi Monta of Genoa v. Cechofracht Co. Ltd.*, [1956] 2 Q.B. 555. See also *Reel v. Holder*, [1979] 1 W.L.R. 1252 ('country'); this *Year Book*, 50 (1979), pp. 217–18.

<sup>3</sup> Cf. *Duff v. R.*, (1979) 28 Aust. L.R. 663, 695 (Federal Court of Australia).

<sup>4</sup> On 'recognition of belligerency' and 'insurgency' see Crawford, *The Creation of States in International Law* (1979), pp. 252–5, and 268–9 and works cited.

<sup>5</sup> [1980] 1 Lloyd's Rep. at pp. 412–25.

<sup>6</sup> Another question of status discussed during 1980 was that of the Channel Islands. The precise issue was whether the Royal Court of Jersey was a 'British court' within s. 122 of the Bankruptcy Act 1914. Counsel relied on a passage in the United Kingdom memorial in the *Minquiers and Ecrehos* case: Pleadings, vol. I, p. 46. But, as Goulding J. pointed out, this was not inconsistent with the Royal Court being a 'British court': in any event, the judgment of the International Court in the *Minquiers* case 'clearly recognizes, or assumes, that sovereignty over the Channel Islands belongs to the United Kingdom': *In re a Debtor, ex parte Viscount of the Royal Court of Jersey*, [1980] 3 W.L.R. 758 at p. 764.

*Forfeiture of goods illegally imported—goods belonging to innocent third party—whether forfeiture illegal expropriation under international law—whether contravention of European Convention on Human Rights*

*Case No. 2. Allgemeine Gold- und Silberscheideanstalt v. Customs and Excise Commissioners*, [1980] 2 W.L.R. 555; [1980] 2 All E.R. 138; [1980] 1 C.M.L.R. 488, C.A. In 1975 two rogues bought from the plaintiffs 1,500 gold coins (Krugerrands) for £120,000 (by the time of judgment they were worth £300,000). Their cheque for the coins was worthless. The rogues attempted to smuggle the coins into the United Kingdom, were detected and convicted under the Customs and Excise Act 1952. After a reference to the European Court of Justice their conviction was affirmed.<sup>1</sup>

Section 44 of the Customs and Excise Act provides that where 'any imported goods are concealed' so as to deceive a customs officer the goods are liable to forfeiture.<sup>2</sup> The coins here were so concealed: the question was whether they were 'goods' within section 44. (That the coins were 'capital' rather than 'goods' within the Treaty of Rome was of course another matter.<sup>3</sup>) The plaintiffs argued, *inter alia*, that section 44 should be construed in the light of the general international law prohibition of expropriation,<sup>4</sup> so as to preclude forfeiture of goods not the property of persons whose acts rendered them liable to forfeiture.

Arguments based on international law in municipal courts are sometimes made in desperation, as a last resort. In such a case, as here, different strategies of rejection are possible. One can simply assert that the municipal law is clear, or does not allow the suggested interpretation, as Bridge L.J. did:

all I would say is that if I were satisfied, which I am not, that there is such a principle of international law as that for which he contends, I should still be wholly unconvinced that it would be open to us to write into the Customs and Excise Act 1952 the extensive amendments which it would be necessary to introduce in order to give effect to that principle and to make an exception from liability to forfeiture, where there had been a plain case under the language of the statute giving rise to a forfeiture, in favour of a foreign owner of goods who could show he had not been a party to the act out of which the liability to forfeiture arose.<sup>5</sup>

Or one can say that the suggested international law rule does not exist, or does not apply to the case in hand, as Lord Denning M.R. did:

I believe that the general body of opinion in international law is that you should not confiscate the property of an alien by nationalisation except on due compensation. Nevertheless it is clear to my mind that that provision of international law has no application whatever to a case of this kind. This is property which is smuggled into a country contrary to its own laws for the protection of its customs duties and other duties. No ruling of international law invalidates legislation such as we have here in the Customs and Excise Act 1952.<sup>6</sup>

The proposition that seizure of goods as a measure of bona fide enforcement

<sup>1</sup> See *R. v. Thompson (Ernest)*, [1980] 1 W.L.R. 521, E.C.J.

<sup>2</sup> S. 288 allows restoration of forfeited goods, which may be subject to conditions.

<sup>3</sup> As the European Court had held: above, n. 1. See [1980] 2 W.L.R. at pp. 563-4 *per* Bridge L.J.

<sup>4</sup> Or, alternatively, so as to be consistent with Art. 1 of the First Protocol to the European Convention on Human Rights. Only Lord Denning M.R. dealt with this argument. Although 'we do pay attention to the Convention as it stands', the exception for deprivation 'in the public interest' in Art. 1 applied here: at p. 561.

<sup>5</sup> At p. 564.

<sup>6</sup> At pp. 561-2.



of customs legislation is not expropriation is well settled,<sup>1</sup> though no authority was actually cited.

Or one can say that international law does not, in general, maintain foreign-owned property inviolable from seizure: it only requires a (controversial) measure of compensation. The 1952 Act expressly makes provision for compensation or return, at the discretion of the customs commissioners. There could be no question, then, of construing the Act any more narrowly to meet the requirements of international law. As Sir David Cairns said:

Whatever may be the extent of the principle of international law about the confiscation of goods belonging to aliens, that principle in my view clearly cannot apply to the forfeiture of smuggled goods. If an alien can show that such forfeiture would involve depriving him of his property and that he is innocent of any complicity in the smuggling, it is appropriate that there should be an opportunity for him to apply for the exercise of discretion in his favour, but I cannot see that it would be possible so to construe the Act as to exclude from the forfeiture provision any goods belonging to such an alien.<sup>2</sup>

There is a good deal to be said for preferring the second or third strategies to the first. Not only is the plaintiff's case met head on, but the question of interpretation is not prejudged. In another statutory context, it might have been desirable to construe 'goods' as 'goods the property of the defendant': for the reasons given by the Court that was not necessary here.

*European Convention on Human Rights—relevance in determining common law—contempt of court*

*Case No. 3. Attorney-General v. British Broadcasting Corporation*, [1980] 3 W.L.R. 109, H.L., reversing [1979] 3 W.L.R. 312; [1979] 3 All E.R. 45; (1979) 78 L.G.R. 137, C.A. This was an action brought by the Attorney-General for an injunction to stop the B.B.C. from broadcasting a programme on the Exclusive Brethren, on the ground that the broadcast (a 'repeat' broadcast) would be a contempt of court. The court in question was a local valuation court, due to sit at Andover to decide whether the Andover meeting-room of the Brethren was a place of public religious worship, and so exempt from rates. The B.B.C. in the Divisional Court undertook not to broadcast the programme if the local valuation court was held to be an 'inferior court' for the purposes of protection from contempt of court.<sup>3</sup> The Divisional Court held that it was such a court (though, unknown to it, the rating objection had been withdrawn, so that the Andover hearing never took place). On the specific, very artificial, point at issue, the Court of Appeal affirmed that judgment (Lord Denning M.R. dissenting).<sup>4</sup>

A fortnight later the European Court of Human Rights decided, in the *Sunday Times* case, that the decision of the House of Lords in *Attorney-General v. Times Newspapers* on contempt of court was a breach of Article 10 (2) of the European Convention.<sup>5</sup> The European Court was required to balance the right of freedom of expression (Article 10 (1)) and the limitations on that right 'necessary in

<sup>1</sup> See S. Friedman, *Expropriation in International Law* (1953), p. 1 (and cases there cited); G. White, *Nationalization of Foreign Property* (1961), pp. 41-2; B. A. Wortley, *Expropriation in Public International Law* (1959), pp. 40-6.

<sup>2</sup> [1980] 2 W.L.R. at p. 564.

<sup>3</sup> R.S.C. Ord. 52 R. 1 (2) (a) (iii).

<sup>4</sup> [1979] 3 W.L.R. 312. No reference was made to the European Convention in any of the judgments.

<sup>5</sup> The House of Lords decision is at [1974] A.C. 273; that of the European Court at *Publications of the European Court of Human Rights, Series A, Judgments and Decisions*, vol. 30 (1979), p. 1.

a democratic society . . . for maintaining the authority and impartiality of the judiciary' (Article 10 (2)). As it pointed out,<sup>1</sup> this was not quite the same task as that of the House of Lords, not bound by the European Convention but applying the common law of contempt, which is traditionally weighted in favour of judicial independence from comment in matters *sub judice*, rather than freedom of speech. In hard cases, this difference of emphasis was likely to lead to a difference in result, and in the *Sunday Times* case it did so. In Britain the European Court's decision was not universally well received<sup>2</sup> (though the law of contempt of court is acknowledged to be in need of reform). Coming after that decision, the appeal to the House of Lords in *Attorney-General v. British Broadcasting Corporation* presented then an interesting, for British courts probably a unique, situation: reflection by the House on a decision of an international court reflecting adversely on an earlier decision of the House on a matter of the United Kingdom's international responsibility.

The effect was rather spoiled by the artificial way in which the issue was presented. Whether the Andover local valuation court is an inferior court within R.S.C. Order 52 Rule 1 is not a matter decisive of any question under the Convention. Whether or not the term 'judiciary' in Article 10 includes the members of bodies such as local valuation courts, the Convention no doubt requires protection of the integrity of proceedings even in tribunals which are not 'courts' for the purposes of the contempt rules; but that protection must be activated only when really necessary 'in a democratic society', bearing in mind the value of freedom of speech. What matters is the balancing of conflicting considerations on the merits of the case. The vice in the English law of contempt is not its extension to local valuation courts but the (as the European Court held) excessive weight it gives to the protection of judicial proceedings as against freedom of speech. Re-examining the weight of these conflicting considerations was not a matter directly before the House. The most that could be done was to deprive local valuation courts altogether of protection under Order 52 Rule 1. In the event, two of their Lordships adopted this 'second-best' stance, referring expressly to the Convention. Lord Fraser was one; he said:

in deciding this appeal the House has to hold a balance between the principle of freedom of expression and the principle that the administration of justice must be kept free from outside interference. Neither principle is more important than the other, and where they come into conflict, as they do in this case, the boundary has to be drawn between the spheres in which they respectively operate. That is not the way in which the European Court of Human Rights would approach the question.

It is, therefore, not to be expected that decisions of this House on questions of this sort will invariably be consistent with those of the court. This House, and other courts in the United Kingdom, should have regard to the provisions of the Convention . . . and to the decisions of the Court of Human Rights in cases, of which this is one, where our domestic law is not firmly settled. But the Convention does not form part of our law, and the decision on what that law is is for our domestic courts and for this House . . .

The contention on behalf of the Attorney-General was that the class of inferior courts to which Order 52 applied consisted of all bodies which possess certain characteristics, including having been created by the Crown or by Parliament, and administering justice in public, even though they were not courts of justice in the full sense. But that definition is open to two grave objections; it is too uncertain and it is probably too wide. Uncertainty

<sup>1</sup> Ibid., p. 41, cited by Lord Fraser, [1980] 3 W.L.R. 109 at p. 128.

<sup>2</sup> See, e.g., F. A. Mann, *Law Quarterly Review*, 95 (1979), pp. 348-54.

is a serious objection because of the large number of tribunals set up by modern legislation, many of which might be on the borderline. It is undesirable that anyone intending to publish information in the newspapers or on radio or television relating to proceedings pending before a tribunal should have to examine in detail the functions and constitution of the tribunal in order to ascertain whether it is protected by the law against contempt. The second objection is even more serious, because, if protection is extended widely, the right to freedom of expression would be correspondingly reduced. That objection would have great weight with an English court without reference to the Convention, and it is reinforced by the Convention. The contention of the Attorney-General cannot therefore be accepted . . .<sup>1</sup>

Not surprisingly, Lord Scarman was the other. He said:

coming to your Lordships' House so soon after the European Court of Human Rights has held that a decision of this House . . . was an interference with the newspaper's right to freedom of expression which could not be justified under article 10 (2) of the Convention [this appeal] has an enhanced importance. Of course, neither the Convention nor the European Court's decision in *The Sunday Times* case is part of our law. This House's decision, even though the European Court has held the rule it declares to be an infringement of the Convention, is the law. Our courts must continue to look not to the European Court's decision but to the House of Lords decision for the rule of English law. Yet there is a presumption, albeit rebuttable, that our municipal law will be consistent with our international obligations . . . Moreover, under the Practice Statement of July 1966 this House has taken to itself the power to refuse to follow a previous decision of its own, if convinced that it is necessary in the interest of justice to depart from it. Though, on its facts, the present case does not provide the House with the opportunity to reconsider its *Sunday Times* decision (and we have heard no argument on the point), I do not doubt that, in considering how far we should extend the application of contempt of court, we must bear in mind the impact of whatever decision we may be minded to make upon the international obligations assumed by the United Kingdom under the Convention. If the issue should ultimately be, as I think in this case it is, a question of legal policy, we must have regard to the country's international obligation to observe the Convention as interpreted by the Court of Human Rights.<sup>2</sup>

His Lordship concluded . . .

Neither the meagre authorities available in the books nor the historical origins of contempt of court require the House to extend the doctrine to administrative courts and tribunals. Legal policy in today's world would be better served, in my judgment, if we refused so to extend it. If Parliament wishes to extend the doctrine to a specific institution which it establishes, it must say so explicitly in its enactment; as it has done on occasion . . . I would not think it desirable to extend the doctrine, which is unknown, and not apparently needed, in most civilised legal systems, beyond its historical scope, namely the proceedings of courts of judicature. If we are to make the extension, we have to ask ourselves, if the United Kingdom is to comply with its international obligations, whether the extension is necessary in our democratic society. Is there 'a pressing social need' for the extension? For that, according to the European Court of Human Rights, is what the phrase means. It has not been demonstrated to me that there is.<sup>3</sup>

The House of Lords unanimously allowed the appeal, holding that the local valuation court did not have the protection of the rules of contempt of court. Although only this minority expressly referred to the point, Lord Salmon and Lord Edmund-Davies also stressed the civil liberties issue at stake in an extended

<sup>1</sup> [1980] 3 W.L.R. at pp. 128-9.

<sup>2</sup> At p. 130.

<sup>3</sup> At p. 137.



protection of 'inferior courts'.<sup>1</sup> Their Lordships may only have been determined to show how common law courts, unaided by Convention standards, can preserve the values of freedom of expression in a democratic society: but that determination itself may be evidence of the Convention's influence, in emphasizing the priority of those standards and values.<sup>2</sup>

*International convention—relation to statute—presumption of conformity—effect of Patents Act 1977, s. 130 (7)*

*Case No. 4. Smith Kline & French Laboratories Ltd. v. R. D. Harbottle (Mercantile) Ltd. & Ors.*, [1980] 1 C.M.L.R. 277; [1979] Fleet Street Reports 555, Oliver J. The extent to which municipal legislation reflects or implements

<sup>1</sup> At pp. 119–21, 122–3 respectively.

<sup>2</sup> As is becoming usual, in a number of other cases the European Convention was relied on. *United Kingdom Association of Professional Engineers v. A.C.A.S.*, [1980] 2 W.L.R. 254, H.L., involved an attempt at judicial review of the Advisory, Conciliation and Arbitration Service in a trade-union recognition dispute. It had been argued, *inter alia*, that the freedom of association guaranteed by Art. 11 of the European Convention required recognition of the union. Lord Scarman (with whom Lords Wilberforce, Edmund-Davies and Keith agreed) said:

'Article 11 of the convention and the common law recognise and protect the right of association, which in the present context includes the right to join a trade union. But it does not follow from the existence of the right that every trade union which can show it has members employed by a particular company or in a particular industry has a right to recognition for the purposes of collective bargaining. I would be surprised if either the convention or the common law could be interpreted as compelling so chaotic a conclusion. If the common law is to be so understood (and I do not accept that it is), Parliament has averted the mischief by the statute. And, if it be a possible interpretation of the European Convention, I shall not adopt it unless and until the European Court of Human Rights declares that it is correct. Suffice it to say that I understand why counsel for the respondents did not seek to support this ground of challenge in your Lordships' House. Until such time as the statute is amended or the convention both becomes part of our law and is authoritatively interpreted in the way proposed by Lord Denning M.R., the point is a bad one' (at pp. 266–7).

Lord Diplock made no reference to the point. In *Morris v. Beardmore*, [1980] 3 W.L.R. 283, Lord Diplock and Lord Scarman positively disagreed. At stake was the right of police officers, though trespassers in the defendant's bedroom, to require him to take a breath test. Lord Scarman supported the conclusion that he could not be so required by referring to the European Convention (at p. 296). Lord Diplock, agreeing in the result, thought that the presumption that Parliament did not intend to authorize tortious conduct 'owes nothing to the European Convention' (at p. 288). The erratic nature of the debate is illustrated by the fact that there was no reference to European Convention standards in another, probably more important, search and seizure case: *I.R.C. v. Rossminster Ltd.*, [1980] 1 All E.R. 80; cf. the trenchant note by F. A. Mann, *Law Quarterly Review*, 96 (1980), pp. 201–3. An earlier unreported case involving the European Convention is *Uppal v. Home Office* (Megarry V.C., 20 October 1978). The plaintiffs sought a declaration that they could not be detained or deported as illegal immigrants pending their application to the European Commission under Art. 25. In part, this was a claim to direct enforcement of the Convention, at least by way of declaration. Megarry V.C. said that 'obligations in international law which are not enforceable as part of English law cannot . . . be the subject of declaratory judgments or orders' (Transcript, p. 18). Secondly, it was argued that the Home Secretary's 'duty to act fairly' entailed that deportation be stayed, since the immigrant had a 'legitimate expectation' under Art. 25 of being able to petition the Commissioner. Megarry V.C. held that, the preparation and presentation of the plaintiffs' petition having been completed, their deportation would probably not contravene Art. 25, however liberally construed (*ibid.*, pp. 20–4, citing *X v. Federal Republic of Germany*, *Yearbook of the European Convention on Human Rights*, 7 (1964), p. 298). In any event, there had been no procedural unfairness (pp. 27–8). He left open the question whether provisions of the Convention might establish 'legitimate expectations' enforceable in an English court (pp. 25–7). An appeal to the Court of Appeal was dismissed by consent (2 November 1978; see Revised Judgment (transcript) at p. 2 *per* Roskill L.J.). See also *Thornhill v. Attorney-General of Trinidad and Tobago*, [1980] 2 W.L.R. 510 (P.C.) at p. 516, *Panesar v. Nestlé Co. Ltd.*, [1980] I.C.R. 144 at p. 147 *per* Lord Denning M.R., and Case No. 2, above p. 305 n. 4.

treaties has increased markedly since 1945; a significant proportion of all legislation is now of this kind. With the quantitative increase has come diversity in the drafting techniques used.<sup>1</sup> This case concerned a rather unusual variant, contained in section 130 (7) of the Patents Act 1977 (U.K.):

Whereas by a resolution made on the signature of the Community Patent Convention the governments of the member states of the European Economic Community resolved to adjust their laws relating to patents so as (among other things) to bring those laws into conformity with the corresponding provisions of the European Patent Convention, the Community Patent Convention and the Patent Co-operation Treaty, it is hereby declared that the following provisions of this Act . . . are so framed as to have, as nearly as practicable the same effects in the United Kingdom as the corresponding provisions of the European Patent Convention, the Community Patent Convention and the Patent Co-operation Treaty have in the territories to which those Conventions apply.<sup>2</sup>

Section 60, one of the provisions enumerated in section 130 (7), provides that it is an infringement of a patent where a person without authorization ' . . . makes, disposes of, offers to dispose of, uses or inspects the product *or keeps* it whether for disposal or otherwise'. The 'corresponding provision' of the European Community Patent Convention<sup>3</sup> is Article 29, which gives the patentee the right to prevent anyone 'from making, offering, putting on the market, or using a product which is the subject matter of the patent, or importing *or stocking* the product for these purposes'.

The second defendants, British Airways, carried into the United Kingdom and stored certain drugs, to the order of the first defendants. The plaintiffs were the patentees. There was no doubt that the first defendants were liable for infringement of the patent: the only question was whether British Airways were also liable. That depended on whether their warehousing the drug was an act of 'keep[ing] . . . for disposal or otherwise' within section 60. Clearly it was not an infringement of Article 29, since they could not be said to be 'stocking the product' for any of the enumerated purposes. In view of the strongly affirmative language of section 130 (7), that should have been sufficient to justify reading down the term 'keeps . . . for disposal or otherwise'. Oliver J. adopted this view, though only with some hesitation:

It is I think obvious from a comparison of the provisions of Article 31 and the provisions of section 60 (5) that the intention of the framers of the statute was to give effect to the provisions of the Convention, and indeed, as I have pointed out, section 130 (7) states not only that that was the intention but that it is . . . being achieved . . . In my judgment, clearly what the draftsman had in mind was 'keeping' in the sense of 'keeping in stock' so as to give effect to the words of the Convention 'stocking the product for these purposes'. Mr. Gratwick therefore submits that, whatever else the word may mean in the section, the word 'keep' in the context of this Act connotes a keeping in some capacity and for a purpose other than that of a mere custodian or warehouseman. He submits that there is at least an ambiguity here, and he referred me to the following passage from *Gartside v. Inland Revenue Commissioners*, where Lord Reid says: 'It is always proper to construe an ambiguous word or phrase in light of the mischief which the provision is obviously

<sup>1</sup> See this writer, 'The International Law Standard in the Statutes of the United Kingdom and Australia', *American Journal of International Law*, 73 (1979), pp. 628-46 for a review.

<sup>2</sup> Cf. *ibid.*, p. 640. Oliver J. described this as a 'striking and unusual' provision: [1980] 1 C.M.L.R. at p. 286.

<sup>3</sup> Cmnd. 6553 (1975).

designed to prevent, and in light of the reasonableness of the consequences which follow from giving it a particular construction'.

I find this argument persuasive. If it had really been intended to effect a revolutionary change, such as Mr. Prescott suggests, I would have expected it to be done by much stronger and more positive language than this.<sup>1</sup>

What is interesting is not so much the result as His Lordship's reticence in drawing the relevant conclusion from section 130 (7). Reference to the mischief rule, to the ambiguity of the word 'keeps', or to cases where the ordinary presumption of conformity has been applied,<sup>2</sup> was rather beside the point where the statute itself was so explicit in intention. Against this, it can always be said that the best way of accurately implementing a treaty is to use the words of the treaty itself, wherever possible. Section 130 (7) was only an indirect, although forceful, way of bringing about a result which might have been better achieved directly.

*International convention—relation to statute—Warsaw Convention, Article 28—interpretation by reference to French text*

*Case No. 5. Rothmans of Pall Mall (Overseas) Ltd. v. Saudi Arabian Airlines Corporation*, [1980] 3 W.L.R. 642; [1980] 3 All E.R. 359, C.A. affirming Mustill J. Even the enactment of an international convention in its exact terms will not avoid problems of interpretation inherent in the text; the most that can be hoped for is that the interpretative problem be the same as it is in the convention. To that end the courts should have access to all the interpretative aids appropriate to its resolution: in the case of a treaty these include reference to other authoritative language texts, and (in certain circumstances) to *travaux préparatoires*, as well as to case law and practice on the point. In recent years English courts have moved towards this position but, as this case shows, not without hesitation and undue diffidence.

The plaintiffs, Rothmans, contracted in Amsterdam with the defendants, Saudi Arabian Airlines Corporation, to carry cigarettes from Amsterdam to Jeddah. Some of the cigarettes were lost. After inconclusive negotiations the plaintiffs issued a writ out of the High Court, within the two-year limitation period which governs carriage under the Warsaw Convention as amended at The Hague, 1955.<sup>3</sup> The writ was served, outside the two-year period, on a branch office of the defendants in England. The defendants, by mistake, entered an unconditional appearance, which they subsequently sought leave to withdraw, on the ground that England was not a proper forum for the action within Article 28 (1) of the Convention. This provides that an action for damages 'must be brought . . . either before the court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the court having jurisdiction at the place of destination'. The only ground on which it could be argued that England was a Convention forum was if the carrier was 'ordinarily resident' there. Leave to withdraw the appearance having been given (with the consequence that the plaintiffs' claim was

<sup>1</sup> [1980] 1 C.M.L.R. at p. 288.

<sup>2</sup> His Lordship cited *The Jade*, [1976] 1 All E.R. 920, H.L.; this *Year Book*, 48 (1976-7), pp. 339-41.

<sup>3</sup> Cmd. 9824 (1955), given the force of law in the United Kingdom by the Carriage by Air Act 1961, s. 1 (1).



extinguished by Article 29 (1)),<sup>1</sup> the plaintiffs appealed on the question of interpretation.

The authoritative French text of Article 28 (1) refers to 'le tribunal du domicile du transporteur'. Quite clearly, the existence of a branch office in England would not of itself constitute a 'domicile' within the meaning of that term in French law.<sup>2</sup> Since section 1 (2) of the Carriage by Air Act 1961 provides that in the case of conflict between the English and French texts the latter prevails, the point might not have seemed a difficult one. In the event the Court of Appeal, laboriously, agreed. Roskill L.J. said:

if it was intended that a carrier is 'ordinarily resident' because he has a branch office in a particular place, why is there put, in juxtaposition, the two phrases 'ordinarily resident' and 'principal place of business', because it would have been enough simply to have provided for proceedings before the court where the carrier is 'ordinarily resident'? Instead, 'ordinarily resident' is treated as an alternative to the principal place of business...

I think the true interpretation depends upon the fact that this is a self-contained code. The fallacy in [counsel for the plaintiffs'] argument seems to me to lie in this: he seeks to say that because of the provisions regarding 'ordinarily resident', a would-be plaintiff can sue any foreign corporation in England, irrespective of the provisions of article 29, if that foreign corporation was one against whom he could found jurisdiction under the ordinary English procedural rules illustrated by the provisions of Ord. 65, r. 3... So to hold, to my mind, is to apply the technical rules of English procedural law in an alien context where those rules have no logical place at all. Viewing this matter simply as one of the construction of article 28, I find myself in agreement with the judge. I have arrived at that conclusion without reference to the French text of the Convention or to the American cases or to the French case to which we have been referred.<sup>3</sup>

His Lordship went on to refer to the French text, and to the discrepancy between the English translation 'ordinarily resident' and its United States equivalent, 'the court of the domicile of the carrier'. 'Domicile' is, as he observed, not an accurate translation of '*domicile*'.

So the United States cases... all proceed upon a text of article 28 which is different from the English text scheduled to the Act of 1961.

Although the conclusions at which the courts in the United States have arrived is in line with the conclusion at which I have arrived, I venture to think that they do not afford a safe guide to the right conclusion in the present case... because they are all decisions upon a different text.

Similarly, the French case to which we have been referred... turns upon the French text and the word 'domicile'... I do not think it necessary to embark in this judgment upon the difficult question of the relationship, if that is the right word, between the French word 'domicile' and the English word 'domicil' in its English legal usage, though it is perhaps permissible to say that it is often accepted that those two words in the different languages do not bear the same meaning.<sup>4</sup>

Roskill L.J. referred to a recent discussion of the problem, and concluded:

<sup>1</sup> For an interesting discussion of the effects of an unconditional appearance in the wrong forum, see *per* Mustill J., [1980] 3 W.L.R. 642 at pp. 649-51.

<sup>2</sup> See, e.g., N. M. Matte, *Traité de droit aérien — aéronautique* (2nd edn., 1964), pp. 431-2.

<sup>3</sup> [1980] 3 W.L.R. at p. 657. For rejection of the plaintiff's argument from inapposite English authorities see *ibid.*, p. 656, citing *James Buchanan & Co. Ltd. v. Babco Forwarding & Shipping (U.K.) Ltd.*, [1978] A.C. 141; this *Year Book*, 48 (1978), pp. 274-9. Similarly, Ormrod L.J., [1980] 3 W.L.R. at p. 659.

<sup>4</sup> At p. 658. The French case referred to was *Consorts Tarnay c. Compagnie Varig* (Tribunal de Grande Instance de Paris, 28 April 1978); *Revue française de droit aérien*, 1978, p. 211.

I refer to that interesting passage not because it affords a safe or indeed any guide to the solution of the problem with which we are concerned, but because it contains an interesting summary and, I venture to think, a useful warning of the dangers which may arise if one tries to apply the language of the text of other translations to the English text of article 28 which is scheduled alongside the French text in our statute.<sup>1</sup>

With respect, this is to confuse the question of the relation of the French *domicile* to the Anglo-American term 'domicile', with its relation to the statutory term 'ordinarily resident'. Only the latter question arose here. To reject the clear assistance given by the French text (and the French case-law on it) would have been too cautious even without section 1 (2) of the 1961 Act. In view of that statutory directive, it was doubly unnecessary.

*European Economic Community Treaty, Art. 119—European Communities Act 1972, s. 2 (4)—interpretation of later British Act by reference to Treaty—requirement of ambiguity*

*Case No. 6. Macarthy's Ltd. v. Smith*, [1979] I.C.R. 787, C.A.; [1980] 3 W.L.R. 929, [1980] 2 C.M.L.R. 217, E.C.J. & C.A. Both Cases Nos. 4 and 5 involved some degree of judicial unresponsiveness to statutory provisions designed to ensure conformity between the statute and the international obligations of the forum. In both cases, while the correct result was eventually reached as a matter of substantive law, the adjectival law applied, the method of interpretation, proved more resistant to statutory direction. It is said: *non c'e'il due senza il tre*. The decision of the Court of Appeal here, under the Equal Pay Act 1970, involved to a marked degree a failure to apply the interpretative injunction in section 2 (4) of the European Communities Act 1972, and a rigid adherence instead to 'our canons of [literal] construction'. Although the subject-matter was European rather than general international law, the problems of technique are similar, indeed overlapping.

Article 119 of the European Community Treaty establishes the principle that 'men and women should receive equal pay for equal work'. So far as it relates to 'work of equal value', as distinct from 'work to which equal value is attributed', Article 119 is directly applicable (in general international legal terms, self-executing).<sup>2</sup> Section 2 (4) of the European Communities Act 1972 provides that 'any enactment passed or to be passed . . . shall be construed and have effect subject to' European Community law. The effect of section 2 (1) is to repeal earlier United Kingdom legislation inconsistent with European community law, but the predominant view is that Parliament cannot, by a provision such as section 2 (1), exclude implied repeal of the 1972 Act in its turn (and thus, *pro tanto*, of European law) by later inconsistent legislation. The effect of section 2 (4) on the interpretation of later legislation is thus of cardinal importance: as time goes on it becomes the primary means of avoiding conflict between European law and British legislation.

The Equal Pay Act 1970 was enacted to require equal treatment (including pay) for men and women engaged in 'like work' in the 'same employment' (section 1 (1)). In 1975 a new section 1 was substituted: it provides for equality of

<sup>1</sup> At p. 659, citing Miller, *Liability in International Air Transport* (1977), pp. 300-1. Note also that leave to appeal from this decision was given.

<sup>2</sup> *Defrenne v. Sabena*, [1976] I.C.R. 547, E.C.J. See also Art. 1 of Council Directive 75/117/E.E.C., 10 February 1975.

employment where a woman 'is employed on like work with a man in the same employment' (section 1 (2) (a)) or 'where the woman is employed on work rated as equivalent with that of a man in the same employment' (section 1 (2) (b)).<sup>1</sup> The respondent was employed as a stock-room manager for the appellant company, four months after the previous manager, a man, had left. She was paid less than the previous manager for what was held to be 'like work'. The only barrier to her receiving the extra pay under the 1970 Act as amended was the argument that section 1 (2) (a) applies only to contemporaneous employment: that it requires the man and the woman to be employed at the same time.

Article 119 of the Treaty of Rome requires that men and women receive 'equal pay for equal work': clearly enough, work can be 'equal' even if the two jobs are not contemporaneous. Similarly, section 1 (1) (a) of the Equal Pay Act 1970 as originally enacted refers only to 'men and women employed on equal work', to 'equal treatment with men . . . employed by her employer'. The word 'employed' here is capable of being read to cover men previously employed, and even if it were not, section 2 (1) of the 1972 Act entailed that Article 119 of the Treaty would override it. Although it was not referred to in the Court of Appeal, Article 2 (1) of the International Labour Organization Convention No. 100 also requires 'equal remuneration . . . for work of equal value':<sup>2</sup> again no requirement of contemporaneous employment can be discerned. The position was, then, that in 1975 the international obligations of the United Kingdom—both general and European—required adherence to the principle of equal pay for one in the respondent's situation, and the existing domestic law complied with this principle (and if it did not, was overridden by Article 119). The appellant's argument was that the 1975 amendment resiled from this position, providing less protection than that given by the 1970 Act and less than that required by European Community law and the international obligations of the forum. Remarkably, at least one, and possibly two, members of the Court of Appeal seem to have agreed.

When the case first came before the Court the majority (Lawton and Cumming Bruce L.JJ.) held that the grammatical interpretation of new section 1 (2) (a) required contemporaneous employment. Lawton L.J. said:

In my judgment the grammatical construction of section 1 (2) is consistent only with a comparison between a woman and a man in the same employment at the same time. The words, by the tenses used, look to the present and the future but not to the past. They are inconsistent with a comparison between a woman and a man, no longer in the same employment, who was doing her job before she got it . . .

As the meaning of the words used in section 1 (2) and (4) is clear, and no ambiguity, whether patent or latent, lurks within them, under our rules for the construction of Acts of Parliament the statutory intention must be found within those words. It is not permissible to read into the statute words which are not there nor to look outside the Act . . . to read the words used in a sense other than that of their ordinary meaning.<sup>3</sup>

Cumming-Bruce L.J. agreed:

I do not think that it is permissible, as an aid to construction, to look at the terms of the

<sup>1</sup> Sex Discrimination Act 1975, s. 8. For the meaning of 'work rated as equivalent' see Equal Pay Act 1970, s. 1 (5).

<sup>2</sup> I.L.O. Convention No. 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, Geneva, 29 June 1951, Art. 2 (1): *United Kingdom Treaty Series*, No. 88 (1972) (in force for U.K.: 15 June 1972).

<sup>3</sup> [1979] I.C.R. at pp. 793-4.



Treaty. If the terms of the Treaty are adjudged in Luxembourg to be inconsistent with the provisions of the Equal Pay Act 1970, European law will prevail over that municipal legislation. But such a judgment in Luxembourg cannot affect the meaning of the English statute.<sup>1</sup>

These passages are remarkable in three ways. First is the splendidly insouciant reliance on 'our' exclusionary rules of construction, in the face of recent authority developing and extending *those* rules, so as to allow reference to international texts not as a last resort but as a primary means of interpretation.<sup>2</sup> Second is the remarkable way in which the statutory directive, in section 2 (4) of the 1972 Act, to construe subsequent British legislation consistently with European law, was ignored. Perhaps the majority thought that what they were doing was not construing. But, equally, it was not light reading. Third, as Professor Hood Phillips pointed out,<sup>3</sup> is the bind they created for themselves by failing to apply the interpretative rule in section 2 (4). This was later legislation, and if the European Court (to which the interpretation of Article 119 was referred) held that Article 119 required equal pay for successive employment, the Court of Appeal had either to hold that the 1975 amendment involved a partial 'withdrawal' from the European Community or, in defiance of received constitutional wisdom, to override the 1975 amendment under section 2 (1) of the 1972 Act.

It might be fairer to treat the Court of Appeal as having engaged in a form of interrupted interpretation: Lawton L.J.'s judgment, at least, can be read in this way. It was not possible to 'construe' the 1975 amendment in the light of Article 119 without knowing what Article 119 means: that question was referred to the European Court, and in the meantime the domestic Court's interpretation of section 1 (2) (a) was merely provisional. This is a rather categorical mode of interpretation, but it does at least get Lawton L.J. out of the difficulties referred to. (And it does leave room for reference to the European Court *in medias res*.)

In the event, and not surprisingly, the European Court held that Article 119 requires equal pay in cases of successive but equal employment, and in so doing creates an enforceable Community right.<sup>4</sup> On the case's return to the Court of Appeal the majority (Lord Denning M.R., vindicated in his approach at the earlier hearing, and Lawton L.J., who agreed with him) took the route of interpretation: section 1 (2) (a) was to be interpreted in the light of Article 119 so that the respondent was entitled to equal pay. As Lord Denning said:

The argument before us today was as to costs. It was argued that in the hearing before the tribunals—and indeed before this court—Macarthy Ltd. were entitled to look solely to our English statute on equal pay. It was said that, in that statute, our Parliamentary draftsmen thought they were carrying out—and intended to carry out—the provisions of the Treaty. So much so that, before the European Court at Luxembourg, the British government argued that, in order for the woman to be entitled to equal pay, her employment had to be contemporaneous. Accordingly Macarthy said that they were entitled to go by the English statute, and not the Treaty: and so the costs should not fall upon them of the appeal to this court.

<sup>1</sup> At p. 798. Lord Denning M.R. dissented: 'In construing our statute, we are entitled to look to the Treaty as an aid to its construction: and even more, not only as an aid but as an overriding force', subject only to the possibility that Parliament may (in clear terms) repudiate some obligation under the Treaty—in which case the legislation prevails: at p. 789.

<sup>2</sup> Below, p. 317 n. 1.

<sup>3</sup> *Law Quarterly Review*, 96 (1980), pp. 31–4; similarly, *ibid.*, 95 (1979), pp. 167–71.

<sup>4</sup> [1980] 3 W.L.R. 931 at pp. 944–7. The European Court held that the matter was fully covered by Art. 119, so that no reference to the 1975 Directive was required.

The answer is this: Macarthy's had no right to look at our English statute alone. They ought throughout to have looked at the Treaty as well. Community law is part of our law by our own statute, the European Communities Act 1972. In applying it, we should regard it in the same way as if we found an inconsistency between two English Acts of Parliament: and the court had to decide which had to be given priority. In such a case the party who loses has to pay the costs.<sup>1</sup>

But Cumming-Bruce L.J., stung by Professor Hood Phillips's note, went on to explain his earlier *dictum*, and in doing so managed to compound the felony. At the earlier hearing,

The majority in this court took the view that there was no ambiguity about the words of the Equal Pay Act 1970 which we had to construe; and, as there was no ambiguity, the majority took the view that it was not appropriate, according to English canons of construction, to look outside the statute at article 119 as an aid to construction. In my view that was clearly right, but I would make it clear that had I been of the view that there was an ambiguity in the English statute, I would have taken the view that it was appropriate to look at article 119 in order to assist in resolving the ambiguity.<sup>2</sup>

This still looks suspiciously like the heterodox route of overruling later legislation by earlier, against which Hood Phillips's note was directed. If, as a matter of interpretation, section 1 (2) (a) meant what Cumming-Bruce L.J. said, the decision of the European Court as to the meaning of Article 119 could not change that interpretation. All it could do—if constitutionally possible—was override section 1 (2) (a). Apparently, in Cumming-Bruce L.J.'s view, what is fundamental and unchangeable about the British polity is not the sovereignty of Parliament (so that subsequent legislation prevails, whatever the consequences), but the rule of insular, literal interpretation. Perhaps that is to prefer a notional island to the real one?<sup>3</sup>

*International convention—relation to statute—Warsaw Convention, Article 26 (2)—interpretation by reference to French text—relevance and admissibility of travaux préparatoires*

*Case No. 7. Fothergill v. Monarch Airlines Ltd.*, [1980] 3 W.L.R. 209, H.L.,

<sup>1</sup> [1980] 3 W.L.R. at p. 948.

<sup>2</sup> At p. 949.

<sup>3</sup> For an alternative, unconvincing, explanation see E. Ellis, *Law Quarterly Review*, 96 (1980), pp. 511–14. In another decision on the Equal Pay Act 1970 similar problems arose. The question was whether the term 'determined' in s. 1 (2) (b) (ii) of the Act was to be given its literal interpretation as a past participle, or whether the 1975 Directive could be employed as an aid to purposive interpretation. Cumming-Bruce L.J. (with whom Waller and Stephenson L.JJ. agreed) said that '... the meaning of those words is reasonably plain, there is, on ordinary principles of construction, no occasion to look to the Community legislation as an aid to interpretation': *O'Brien v. Sim Chem Ltd.*, [1980] 1 W.L.R. 734 at p. 744. The Court also held that Art. 1 of the 1975 Directive was not directly applicable. Despite the headnote, this latter point related not to the interpretation of s. 1 (2) (b) (ii) but to the direct applicability of the European rule, a distinction which presents almost the same difficulty as that drawn by Cumming-Bruce L.J. in *Macarthy's Ltd. v. Smith*.

Whether article 1 of the 1975 Directive is directly applicable is an interesting question: it was left open by the European Court in *Macarthy's Ltd. v. Smith* (above, p. 315 n. 4). In *Henn and Darby v. D.P.P.*, [1980] 2 W.L.R. 597, E.C.J. and H.L., Lord Diplock went out of his way to stress the contrast between European and English methods of interpretation in matters such as this: at p. 636. The point was also strongly made by Templeman L.J. in *Polydor Ltd. v. Harlequin Record Shops Ltd.*, [1980] 2 C.M.L.R. 413, C.A., where it was held that Art. 14 of the Treaty of 19 December 1972 between the European Communities and Portugal was directly applicable and overrode the provisions of s. 16 (2) of the Copyright Act 1956: cf. at pp. 423–5, 427.

reversing [1980] Q.B. 23, C.A., [1978] Q.B. 108, Kerr J. This is the third important case in three years in which the House of Lords has had to pronounce on the problems of interpretation of treaty-implementing legislation.<sup>1</sup> Although in each case the House has been more or less receptive to the argument that such legislation required more liberal approaches to, and specific techniques of, interpretation, in the earlier cases there was a degree of disagreement and difference both of approach and technique, which to some extent obscured the real changes in interpretative method. Questions of interpretation notoriously cause differences of opinion and approach, but these differences, in *Fothergill's* case, are relatively unimportant. With the partial exception of Lord Fraser, the House strongly affirmed the propriety of using various 'international' interpretative techniques, and there was general agreement on the need for purposive interpretation of legislation of this kind, unfettered by stricter domestic rules. This was strikingly so in the discussion of the admissibility of *travaux préparatoires*, where the domestic rule, recently reaffirmed by the House, is strictly exclusionary.<sup>2</sup>

The point at issue was a short one: whether the word 'damage' ('*avarie*'), in Article 26 (2) of the 1955 Warsaw Convention as amended at The Hague,<sup>3</sup> included loss of part of the contents of a suitcase, so as to require notification of the loss within seven days. A majority of the Court of Appeal, affirming Kerr J., held that on the literal interpretation of the English text partial loss was not 'damage', and that the *travaux préparatoires* of the Hague Conference, which suggested a contrary interpretation, were not admissible, for a variety of reasons.<sup>4</sup> Their Lordships did not state that reference to *travaux préparatoires* was entirely excluded, but the limitations they imposed on such reference were likely to have that practical effect.<sup>5</sup>

In the meantime a curious amendment to the 1961 Act had expressly provided that 'damage' in Article 26 (2) *did* include partial loss, but the amendment was prospective only.<sup>6</sup> The Court of Appeal (Lord Denning disagreeing on the point) held that the 1979 amendment could not influence their interpretation of Article 26 (2). On this point the House of Lords fully agreed.<sup>7</sup> But, equally unanimously, the House held that 'damage' did include partial loss, so that, notice not having been given within seven days, Mr. Fothergill's claim was barred. In reaching this conclusion, some combination of four distinct approaches or 'rules' was applied.

(1) *General approach to interpretation of treaty-implementing legislation.* At the forefront, and rightly, was the purposive interpretation of the article in its context. At the level of generality there was agreement. Lord Scarman was, perhaps, the most emphatic:

<sup>1</sup> *James Buchanan & Co. Ltd. v. Babco Forwarding and Shipping (U.K.) Ltd.*, [1978] A.C. 141; this *Year Book*, 49 (1978), pp. 274-9; *Quazi v. Quazi*, [1980] A.C. 744; this *Year Book*, 50 (1979), pp. 227-32. See also *The Jade*, [1976] 1 W.L.R. 430; this *Year Book*, 48 (1976-7), pp. 339-41.

<sup>2</sup> *Davis v. Johnson*, [1979] A.C. 264.

<sup>3</sup> Cmnd. 9824 (1955), implemented by the Carriage by Air Act 1961.

<sup>4</sup> [1980] Q.B. 23; this *Year Book*, 50 (1979), pp. 236-40; affirming Kerr J., [1978] Q.B. 108; this *Year Book*, 49 (1978), pp. 267-70.

<sup>5</sup> Loc. cit. (previous note), pp. 239-40.

<sup>6</sup> Carriage by Air and Road Act 1979, s. 2.

<sup>7</sup> [1980] 3 W.L.R. 209 at p. 214 *per* Lord Wilberforce; at p. 229 *per* Lord Fraser; at p. 242 *per* Lord Roskill.



The broad approach of our courts to the interpretation of an international convention incorporated into our law is well settled. The international currency of the convention must be respected, as also its international purpose. The convention should be construed 'on broad principles of general acceptance'. The approach was formulated by Lord Macmillan in *Stag Line Ltd. v. Foscolo, Mango & Co. Ltd.*; it was adopted by this House in the recent case of *James Buchanan & Co. Ltd. v. Babco Forwarding & Shipping (U.K.) Ltd.*

The implications of this approach remain, however, to be worked out by our courts. Some can be explored in this appeal: but it would be idle to pretend that all can be foreseen. Our courts will have to develop their jurisprudence in company with the courts of other countries from case to case—a course of action by no means unfamiliar to common law judges. I propose, therefore, to consider only the implications and difficulties which arise in the instant case, and to direct myself broadly along the lines indicated by article 32 of the Vienna Convention on the Law of Treaties . . . It matters not how the convention has entered into our law. Once it is part of our law, its international character must be respected.<sup>1</sup>

And this affirmation is nicely balanced by Lord Roskill's review of the case law on treaty interpretation in English courts since 1910: *Buchanan's* case, he said,

shows how changed the position had become at the end of the 60 year period to which I have referred from what it was at the beginning. In my judgment it is now clear law that where the source of the legislation in question is not the ordinary parliamentary process, but is an international treaty or convention and the statute is designed to give effect to that treaty or convention, it is legitimate to look at that source in order to resolve ambiguities in the legislation which has made those treaty or convention provisions part of the ordinary municipal law of this country.<sup>2</sup>

The specific question was also resolved, at least by some of their Lordships, principally through contextual, purposive interpretation. Lord Wilberforce (with whom Lord Diplock agreed) said:

I start by considering the purpose of article 26, and I do not think that in doing so I am infringing any 'golden rule'. Consideration of the purpose of an enactment is always a legitimate part of the process of interpretation, and if it is usual—and indeed correct—to look first for a clear meaning of the words used, it is certain, in the present case, both on a first look at the relevant text, and from the judgments in the courts below, that no 'golden rule' meaning can be ascribed. The purpose of article 26, on the other hand, appears to me to be reasonably clear. It is: (1) to enable the airline to check the nature of the 'damage'; (2) to enable it to make inquiries how and when it occurred; (3) to enable it to assess its possible liability, to make provision in its accounts and if necessary to claim on its insurers; (4) to enable it to ensure that relevant documents (for example, the baggage checks or passenger ticket, or the air waybill) are retained until the issue of liability is disposed of.

If one then inquires whether these considerations are relevant to a case of partial loss of objects contained in baggage, the answer cannot be doubtful: they clearly are. Moreover, prompt notification may give the airline an opportunity of recovering the objects lost.

In particular, as regards (4), preservation of the baggage check is important in order to establish the relevant weight upon which the limit of liability is fixed—see article 22 (2) (b) which explicitly mentions 'any object contained therein' (for example, in registered baggage).

<sup>1</sup> At pp. 233-4.

<sup>2</sup> At p. 239. Cf. also at pp. 214-15 *per* Lord Wilberforce; at p. 223 *per* Lord Diplock; at p. 226 *per* Lord Fraser.

There seems, on the contrary, to be no sense in making a distinction between damage to baggage—which presumably must include damage to contents—and loss of contents.<sup>1</sup>

This suggested view was then confirmed, or at least not displaced, by reference to the English and French texts of the Convention, and the other 'aids' to interpretation.

On the other hand, Lords Fraser, Scarman and Roskill, though influenced by the purposive argument, all thought that the narrower interpretation of 'damage' was the more likely, simply as a matter of English textual interpretation.<sup>2</sup> Their initial view had then to be rebutted, by reference to the French text or to the other 'aids'. In each case, though with differences of emphasis, it was so rebutted.

(2) *Reference to the authoritative French text.* The French text of the Convention is the single authoritative text, which under section 6 (2) of the 1961 Act prevails over the English text in the case of inconsistency. As we have seen, in the *Rothmans* case the Court of Appeal (including Roskill L.J.) failed to refer to the French text to decide the case, in a context where it was probably decisive.<sup>3</sup> The House had no such qualms; indeed, it was Lord Roskill (newly promoted) who gained most assistance from the French '*avarie*'. On the general question there was agreement with Lord Wilberforce, who said:

It is obvious that the present represents a special and indeed unique case. Here it is not only permissible to look at a foreign language text, but obligatory. What is made part of English law is the text set out in *Schedule 1*, i.e. in both Part I and Part II, so both English and French texts must be looked at. Furthermore, it cannot be judged whether there is an inconsistency between two texts unless one looks at both. So, in the present case the process of interpretation seems to involve:

1. Interpretation of the English text, according to the principles upon which international conventions are to be interpreted (see *Buchanan's* case and *Stag Line Ltd. v. Foscolo, Mango & Co. Ltd.*).

2. Interpretation of the French text according to the same principles but with additional linguistic problems.

3. Comparison of these meanings.<sup>4</sup>

Having referred to the English text, he continued:

The *French text* . . . at least, avoids part of the English difficulty, in that it confines the use of the word 'dommage' to monetary loss (articles 17, 18, 19, 20, 25). When it refers to physical 'damage' it uses the word '*avarie*'. So what does '*avarie*' mean? This raises, once more, the question how the court ought to ascertain the meaning of a word or an expression in a foreign language.

My Lords, as in *James Buchanan & Co. Ltd. v. Babco Forwarding & Shipping (U.K.) Ltd.* I am not willing to lay down any precise rule on this subject. The process of ascertaining the meaning must vary according to the subject matter. If a judge has some knowledge of the relevant language, there is no reason why he should not use it: this is particularly true of the French or Latin language, so long languages of our courts. There is no reason why he should not consult a dictionary, if the word is such that a dictionary can reveal its significance: often of course it may substitute one doubt for another. (In *Buchanan's* case I was perhaps too optimistic in thinking that a simple reference to

<sup>1</sup> At p. 215.

<sup>2</sup> At p. 226 *per* Lord Fraser ('But . . . a strictly literal interpretation is not appropriate . . .'); at p. 231 *per* Lord Scarman (but 'the literal construction' is not legitimate); at p. 241 *per* Lord Roskill.

<sup>3</sup> Above, Case No. 5.

<sup>4</sup> [1980] 3 W.L.R. at p. 214.

a dictionary could supply the key to the meaning of 'avarie'.) In all cases he will have in mind that ours is an adversary system: it is for the parties to make good their contentions. So he will inform them of the process he is using, and, if they think fit, can supplement his resources with other material—other dictionaries, other books of reference, text-books and decided cases. They may call evidence of an interpreter, if the language is one unknown to the court, or of an expert if the word or expression is such as to require expert interpretation. Between a technical expression in Japanese and a plain word in French there must be a whole spectrum which calls for suitable and individual treatment.

In the present case the word 'avarie' would not I think convey a clear meaning to an English mind without assistance. The courts (both Kerr J. and the Court of Appeal) therefore looked at dictionaries and at certain text-books and articles and in my opinion this process cannot be criticised. Neither could they have been criticised if they had allowed expert evidence to be called—for 'avarie' is, or may be, a term of art. There were five dictionaries involved, of evidently different standards: some of English publication, others of French. I regard the latter, which provide an analysis, as of greater value than the former, which provide a translation—since then we have to interpret the translation. Two are of high quality—that of M. Raymond Barraine [*Nouveau Dictionnaire de Droit et de Sciences Economiques*, 4th ed. (1974)], and the *Trésor de la langue française* (1974) published by the Centre National de la Recherche Scientifique. They seem to me to show that 'avarie' has both an ordinary meaning and a special meaning as a term of maritime law. In the ordinary meaning, the word signifies physical damage to a movable; in its special meaning, it is capable of meaning physical damage, or loss, including partial loss. In my opinion this does not carry the matter much beyond the English text . . . The linguistic argument, alone, remains to my mind inconclusive.<sup>1</sup>

Lord Roskill gained more assistance from 'avarie' because he emphasized the influence in the Warsaw Convention of maritime law concepts: in maritime law, *avarie's* special meaning as 'partial loss' is reflected in the derived English term 'average'.

On the other hand, Lord Fraser was more restrictive in allowing reference to the French text:

the meaning of 'damage' in article 26 (2) of the English text is, in my opinion, *ambiguous*. It *therefore* becomes necessary to refer to the French text. Such reference would have been proper even if the French and English texts had been equally authentic, and it is essential in this case, where the French text is to prevail. But even in this case it would not be necessary to refer to the French text unless either (1) the English text was ambiguous, *or* (2) the court was invited by one or both parties to refer to the French text for the purpose of considering an alleged inconsistency between the French and the English texts. I do not think that the judge has a duty to search out inconsistencies for himself, although if he happened to notice what he thought was an inconsistency he should invite argument upon it.<sup>2</sup>

Probably, the difference here is not great, since one could hardly expect a judge to advert to inconsistency with the French text if no difference was suggested by counsel or perceived by the judge in his own reading of the text. But the majority's emphatic reference to this authentic French text as an integral part of the process of interpretation is more consistent with section 1 (2) of the Act, and the House's general approach to international legislation.

(3) *Doctrine and foreign case law*. Their Lordships agreed in the need to refer to text writers and case law of other jurisdictions: this was a uniform law convention,

<sup>1</sup> At pp. 215–16. Cf. at p. 223 *per* Lord Diplock; at p. 213 *per* Lord Scarman; at pp. 240–2 *per* Lord Roskill.

<sup>2</sup> At p. 327 (emphasis added).



so that if a consensus existed in other jurisdictions as to the meaning of Article 26 (2) it ought to be followed. But, rather unusually for a common law court, the majority found more assistance from the text-writers than from the case law. Again, Lord Wilberforce's speech is representative. After referring to five civil law writers, he said:

this consensus is impressive. It supports an interpretation of article 26 (2) to which a purposive construction . . . clearly points. The language of both texts is unsatisfactory: some strain, if not distortion, seems inevitable but of the governing French text it can at least be said that it does not exclude partial loss from the scope of the paragraph. I am of opinion therefore, on the whole, that following the sense of the matter and the continental writers we should hold that partial loss of contents is included in 'damage' and that consequent action may be barred in the absence of a timeous complaint. I should add that we were referred to a number of decided cases in various foreign courts, only a few which were cited below. But . . . I do not think that I need or indeed should attempt to summarise them. For three reasons: first, with the exception of one decision of the Belgian Cour de Cassation, they are not decisions of the highest courts; secondly, the process of law reporting varies from country to country and they may not be exhaustive. The dangers inherent in trying to assess a balance of foreign judicial opinion from available cases were well shown in *Ulster-Swift Ltd. v. Taunton Meat Haulage Ltd.* and in *James Buchanan & Co. Ltd. v. Babco Forwarding & Shipping (U.K.) Ltd.* Thirdly, in any event, it was not beyond argument when the facts of each case were carefully examined on which side the preponderance in quantity, or quality, lay. It is safe to say that your Lordships' decision in this case will not be out of line with the balance of decisions given elsewhere.<sup>1</sup>

(4) *Travaux préparatoires of the Hague Protocol.* The issues canvassed above are only elaborations upon rules or approaches already accepted by the courts. But *Fothergill* is most important for its discussion of the problem of *travaux*, for the first time fully argued and fully considered in a common law court. Whether any proposition about *travaux* forms part of the *ratio* of the case is less certain. Lord Scarman certainly, and Lord Diplock probably, treated the question as essential to their conclusion. Lords Wilberforce and Roskill certainly did not. But whatever its formal status, all four were firmly agreed that the *travaux préparatoires* of an international convention are admissible in interpreting the convention where it forms the basis for municipal legislation. This general agreement must be regarded as settling the question of principle for British courts. Its application in practice, as Lord Scarman observed, remains to be worked out, case by case.

On the general point, the most interesting speech was that of Lord Diplock: after stating the exclusionary domestic rule, he said:

The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament that deals with purely domestic law . . . it would seem that courts charged with the duty of interpreting legislation in all the major countries of the world have recourse in greater or less degree to 'travaux préparatoires', or 'legislative history' . . . in order to resolve ambiguities or obscurities in the enacting words; though the extent and character of the extraneous material to which reference is permitted under this head varies considerably as between one country and

<sup>1</sup> At pp. 217-18. Lord Roskill found the writings cited 'most persuasive' (at pp. 241-2). Lord Fraser agreed on this point with Lord Wilberforce (at p. 228). But Lord Diplock and Lord Scarman were less enthusiastic, while not disagreeing in principle: at pp. 225, 235-6 respectively.

another. As Lord Wilberforce has already pointed out, international courts and tribunals do refer to *travaux préparatoires* as an aid to interpretation of treaties and this practice as respects national courts has now been confirmed by the Vienna Convention on the Law of Treaties, to which Her Majesty's Government is a party and which entered into force a few months ago. It applies only to treaties concluded after it came into force and thus does not apply to the Warsaw Convention and Protocol of 1955; but what it says in articles 31 and 32 about interpretation of treaties, in my view, does no more than codify already-existing public international law.

[T]he delegates of the states represented at the international conference at which the Hague Protocol to the Warsaw Convention was concluded may be taken to have known that 'the preparatory work of the treaty and the circumstances of its conclusion' could be taken into consideration in determining the meaning of the Convention where the actual terms, even when read in their context and in the light of the treaty's object and purpose, leave the meaning still ambiguous or obscure.

Accordingly, in exercising its interpretative function of ascertaining what it was that the delegates to an international conference agreed upon by their majority vote in favour of the text of an international convention where that text itself is ambiguous or obscure, an English court should have regard to any material which those delegates themselves had thought would be available to clear up any possible ambiguities or obscurities. Indeed, in the case of Acts of Parliament giving effect to international conventions concluded after the coming into force of the Vienna Convention on the Law of Treaties I think an English court might well be under a constitutional obligation to do so. By ratifying that Convention, Her Majesty's Government has undertaken an international obligation on behalf of the United Kingdom to interpret future treaties in this manner and since under our constitution the function of interpreting the written law is an exercise of judicial power and rests with the courts of justice, that obligation assumed by the United Kingdom falls to be performed by those courts.

My Lords, although each of your Lordships would, I believe, have reached the same conclusion that in article 26 of the Warsaw Convention (as amended) 'damage' or 'avarie' in the case of passenger's baggage does include partial loss of contents, even if no recourse is had to any '*travaux préparatoires*', it would, in my view, be unrealistic to deny that the language of the article is ambiguous, seeing that Kerr J. and two of the members of the Court of Appeal ascribed a narrower meaning to it. So I think the case is one where it is right to have recourse to the minutes of the conference at The Hague to see if they confirm or contradict or contain nothing capable of affecting the *prima facie* view which consideration of the terms of the Convention itself has led your Lordships to form as to the meaning which the expression 'damage' in article 26 was intended to bear.

This said, I do not myself derive any great assistance from this source. With some personal experience of international conferences of this kind, I should not attach any great significance to the fact that two delegates in withdrawing an amendment to article 26 which would have included in the article an express reference to partial loss as well as to damage said, without contradiction by any other delegates who happened to be present at that time, that they did so on the understanding that partial loss was included in the expression damage. Machiavellism is not extinct at international conferences. For what it is worth, however, it tends to confirm the *prima facie* view at which your Lordships had already arrived; and there is nothing else in the minutes of the proceedings which contradicts it.<sup>1</sup>

Lord Wilberforce agreed:

I think that it would be proper for us to recognise that there may be cases where such *travaux préparatoires* can profitably be used. These cases should be rare, and only where two conditions are fulfilled, first, that the material involved is public and accessible, and secondly, that the *travaux préparatoires* clearly and indisputably point to a definite

<sup>1</sup> At pp. 223-5.

legislative intention. It would I think be unnecessarily restrictive to exclude from consideration, as travaux préparatoires, the work of Paris Conference of 1925, and the work of the C.I.T.E.J.A. before 1929, both of which are well known to those concerned with air law, in any case where a clear intention were to be revealed. If the use of travaux préparatoires is limited in this way, that would largely overcome the two objections which may properly be made: first, that relating to later acceding states—as to this see *Brownlie, Principles of Public International Law*, 3rd ed., p. 628, citing the International Law Commission—and secondly, the general objection that individuals ought not to be bound by discussions or negotiations of which they may never have heard.

The presently relevant travaux préparatoires are contained in the minutes of the Hague Conference of 1955, published by the International Civil Aviation Organisation and available for sale in a number of places including Her Majesty's Stationery Office, and so accessible to legislators, text-book writers, airlines and insurers. I would therefore be in favour of a cautious use of work leading up to the Warsaw Convention and the Hague Protocol.<sup>1</sup>

Of the two suggested restrictions, the requirement that the *travaux* point clearly to a conclusion not contradicted by the terms of the treaty itself only reflects Article 32 of the Vienna Convention. The requirement of publication was stressed by the majority in the Court of Appeal; its principal function is probably to restrict private, oral or unreliable material, while allowing reference to officially published debates and reports. As Lord Roskill said, accessibility means accessibility to those professionally involved in the field:

I see . . . the difficulties into which the use of travaux préparatoires may put the private citizen who wishes to bring an action in relation to such matters as those involved in the present case and who has not got and perhaps may not be able to get easy access to such highly specialised knowledge as will be contained in the documents which your Lordships are considering. But in practice I venture to question whether these disputes are likely to arise save between bodies such as cargo underwriters, airlines and the like, who will have been represented at the negotiations leading to a particular convention and who will be fully equipped with the necessary information. That is certainly the position in the present case.<sup>2</sup>

On the question of *travaux* only Lord Fraser disagreed.

It may be legitimate for English courts, when construing an Act of Parliament which gives effect to an international agreement, to make cautious use of the travaux préparatoires for the purpose of resolving any ambiguity in the treaty . . . Even if that be so, we are in this case being invited to go a stage further and I for my part would decline to do so. We were invited to refer to the minutes of the Hague Convention of 1955, at which the Protocol to amend the Warsaw Convention of 1929 was agreed, for the purpose of finding there recorded an agreement between the states represented at the conference that 'damage' in article 26 (2) was to be construed as including partial loss. It was said to be the duty of British courts to give effect to the alleged agreement. I shall assume, for the moment, that such an agreement is recorded in the minutes, although in fact I do not think it is. Making that assumption, I am of opinion that we should decline to give effect to the alleged agreement or to take judicial notice of it, because it has not been sufficiently published to persons whose rights would be affected by it, such as Mr. Fothergill, the respondent. They ought to be entitled to rely on the texts, English and French, scheduled to the Act, without finding the meaning of the text is controlled by some extraneous agreement of which they have no notice. If the meaning of an expression in an Act of Parliament, giving effect to a treaty which directly affects the

<sup>1</sup> At p. 220. Similarly at pp. 235–6 *per* Lord Scarman. Lord Roskill (at p. 242) agreed.

<sup>2</sup> *Ibid.*



rights of private citizens, has been defined by some extra-statutory agreement between the British government and other governments, I do not think the definition ought to be applied as part of English law unless it has been published to the same extent as the Act, as if it were an interpretation clause in the Act, which is what in substance it is. True, the minutes of the Hague Conference were published by the International Civil Aviation Organisation in 1956, in English, French and Spanish, and were on sale at Her Majesty's Stationery Office. Whether they are (or were in March 1975) still obtainable there I do not know, though I have my doubts. In any event, they have never been as readily accessible as the Act itself and in my opinion they have never been reasonably accessible to private citizens, or even to lawyers who do not happen to specialise in air transport law . . . The fact that the parties with the real interest in this appeal happen to be insurers who are probably familiar with the minutes in question does not, in my opinion, affect the principle.

It is not as if there would be any difficulty in publishing an international agreement on the construction of a treaty. A declaratory provision could be included in the Act of Parliament giving effect to the treaty. That has now been done on this very point . . . An agreement, such as is alleged to have been made in this case, must be fairly short and precise, and it differs in that respect from information about the legislative history of the convention which might be found in *travaux préparatoires*, or in the report of the official rapporteur of a conference . . . I am not here concerned with information of that sort, but only with an agreement, or a precisely stated understanding, on the construction of a word or a phrase in a convention. I can conceive of no good reason why the agreed construction should not be expressly set out in an interpretation section of the statute giving effect to the convention. If that is not to be obligatory, as in my opinion it ought to be, then at the very least the statute should draw attention to the agreement. I agree with Kerr J. that the statute should expressly provide that any report by an official rapporteur may be referred to as an aid to its interpretation. That would at least draw attention to the existence of such a document.

The Vienna Convention on the Law of Treaties had not received sufficient ratifications to come into force by the date with which this appeal was concerned, and accordingly it is not relevant to the present question. But it will apply to future treaties, and the British government, by ratifying it, may have undertaken that future treaties will be interpreted in accordance with the rules stated in the Convention. If so, it seems to me that the only way the government can implement its understanding is by ensuring that the legislation for giving effect to future conventions is properly drafted, and, in particular, that it expressly sets out any agreed definitions. If that is not done, my conclusion would be that the government had failed to carry out its undertaking.<sup>1</sup>

His Lordship's distinction between *travaux* and 'agreements' is a curious one. If the participants in a conference agree that a particular term has a certain meaning, that constitutes part of the *travaux préparatoires* of the instrument containing the term. Indeed, it is only where the *travaux* demonstrate some agreement or understanding along these lines that they are likely to persuade a judicial interpreter of the text. So Lord Fraser excludes those aspects of the *travaux* which the other members of the House would treat as persuasive, while being prepared to refer to other material (not showing 'an agreement, or a precisely stated understanding') which they would usually regard as peripheral or of little weight. Of course, an agreement at a conference that a term was to have a stipulated meaning does not give the term that meaning unless it is capable of bearing it. Apart from absurdity or unreasonableness (or its English equivalent, 'golden rule' interpretation), if the draftsmen of a convention wish to give a term

<sup>1</sup> At pp. 228-30.

a stipulative definition, they should say so. Beyond that, rather obvious, level it is hard to appreciate Lord Fraser's attempted distinction.

Lord Fraser also disagreed with Lord Diplock on the effect on domestic methods of interpretation of United Kingdom ratification of the Vienna Convention. Article 32 of the Convention not having been implemented by legislation, it could not be a 'constitutional obligation' for the courts to adopt the supplementary means of interpretation it allows. Perhaps Lord Diplock was saying that implementation by legislation of a treaty carried with it, as a sort of interpretative adjunct, the relevant rules of treaty interpretation: in the case of a treaty negotiated after the Vienna Convention came into force, these are represented by Articles 31-3 of that Convention.<sup>1</sup> Presumably Lord Diplock was not suggesting a new exception to the common law rule that treaties are not self-executing, based upon the constitutional division of powers. But the House's close and conscious adherence to 'international' methods of interpretation means that the courts can play their part in interpreting international legislation without overt legislative direction. *Fothergill* is thus an important affirmation of their autonomy as mediator between the state and the citizen, to which Lord Diplock attaches such value.<sup>2</sup>

*Sovereign immunity—whether restrictive theory established at common law—contract for building work on ambassador's residence—whether iure gestionis—service of writ*

*Case No. 8. Planmount v. Republic of Zaïre*, [1980] 2 Lloyd's Rep. 393, Lloyd J. The new common law of sovereign immunity announced in *Trendtex Trading Corporation v. Central Bank of Nigeria*<sup>3</sup> came as something of a surprise to English judges with a less flexible view of precedent than Lord Denning and Shaw L.J. In *Uganda Holdings*, Donaldson J. went so far as to repudiate *Trendtex* on the ground of inconsistency with prior authority,<sup>4</sup> only to be repudiated in his turn by the Court of Appeal in *Hispano Americana Mercantil*.<sup>5</sup> As the present case clearly shows,

<sup>1</sup> Art. 33 (interpretation by subsequent practice) is capable of raising difficulties: presumably the same distinction must be drawn between 'stipulative' and 'clarifying' practice. The problem lurks in the background in the cases on the I.M.F. Agreement (cf. the following note). See also *Government of the Federal Republic of Germany v. Sotiriadis*, [1975] A.C. 11 at pp. 31-2 *per* Lord Cross.

<sup>2</sup> Cf. [1980] 3 W.L.R. at pp. 221-2. On the relevance of uniform Conventions in determining English law see also *Bankers Trust International Ltd. v. Todd Shipyards Corporation*, [1980] 3 W.L.R. 400 (P.C.). Note especially the divergent attitude of majority and minority to the 'general law of the sea': cf. pp. 405, 411-14 with Lords Salmon and Scarman (diss.) at pp. 415, 417, 419, 422. Cf. also *The Father Thames*, [1979] 2 Lloyd's Rep. 364 at p. 371, *per* Sheen J.; *The Kyoan Maru*, [1980] 2 Lloyd's Rep. 233 at pp. 235-6, *per* Sheen J. On the interpretation and application of Art. 8 (2) (b) of the Bretton Woods Fund Agreement 1946 (implemented by the Bretton Woods Agreement Order in Council 1946) see *United City Merchants (Investments) Ltd. v. Royal Bank of Canada* (No. 2), [1979] 2 Lloyd's Rep. 498, Mocatta J. This is the first reported English case in which Art. 8 (2) (b) was applied to render unenforceable a 'monetary transaction in disguise' (the cost of goods under a contract was artificially inflated to enable the importer of the goods to acquire foreign currency). Cf. *Wilson Smithett & Cope Ltd. v. Terruzzi*, [1976] Q.B. 683; this *Year Book*, 47 (1976-7), pp. 337-9, for the category 'monetary transactions in disguise'. As in *Terruzzi*, the court refused to hold, without strong evidence, that the Peruvian exchange control regulations were not 'maintained or imposed consistently with' the Fund Agreement: at pp. 503-4.

<sup>3</sup> [1977] 1 Q.B. 529; this *Year Book*, 48 (1976-7), pp. 353-62.

<sup>4</sup> [1979] 1 Lloyd's Rep. 481; this *Year Book*, 50 (1979), pp. 218-21.

<sup>5</sup> [1979] 2 Lloyd's Rep. 277; this *Year Book*, 50 (1979), pp. 221-4. Since then, *Trendtex* has been followed in two South African cases: *Inter Science Research and Development Services (Pty.) Ltd. v. Republica Popular de Moçambique*, [1980] (2) S.Af.L.R. 111 (T.P.D.); *Kaffraria Property Co. (Pty.) Ltd. v. Government of the Republic of Zambia*, [1980] (2) S.Af.L.R. 709.

*Trendtex* does now represent the common law, until the House of Lords decides otherwise.

The plaintiffs entered into a written contract with the defendant to carry out building work on the defendant's ambassador's residence in London. The work was done but about a quarter of the contract price remained unpaid. Service of the writ claiming this amount was set aside by the Master on the ground of sovereign immunity. The plaintiffs successfully appealed. Lloyd J. said:

Mr. Hoolahan, on behalf of the defendants, sought to support the Master's decision on two grounds. In the first place he argued that prior to the passing of the State Immunity Act, 1978, the rule of absolute immunity still prevailed in the case of actions in personam. It was only in the case of actions in rem that there had been any relaxation . . .

Secondly, Mr. Hoolahan sought support for his argument from the provisions of the State Immunity Act itself. That Act does not apply directly to this case since it only came into force on Nov. 22, 1978, some 10 months after the contract between the plaintiffs and the defendants. But the clear inference from the way the Act was drafted, says Mr. Hoolahan, is that Parliament was changing the law in respect of actions in personam, but not in respect of actions in rem; for s. 3, which creates an exception to the general rule of immunity in the case of commercial transactions, only applies to transactions entered into after the coming into force of the Act; whereas s. 10, which applies to actions in rem, applies to causes of action arising before the coming into force of the Act. This shows, so it was said, that whereas s. 10 was confirming or codifying existing law, s. 3 was creating new law.

As to Mr. Hoolahan's first argument, it seems to me that the matter is concluded by the decision of the Court of Appeal in *Trendtex*. That case established, by a majority consisting of Lord Denning, M.R., and Lord Justice Shaw, the restrictive theory of sovereign immunity as part of English law. In other words, a foreign state is entitled to sovereign immunity in respect of its governmental acts but not in respect of its commercial transactions. *Trendtex* was itself an action in personam. It is impossible to treat the judgments of the majority in that case as being confined to actions in rem. It is true that Mr. Justice Donaldson in the *Uganda* case regarded the decision in *Trendtex* as being irreconcilable with the previous decision of the Court of Appeal in *Thai-Europe*. But the *Uganda* case is not the latest pronouncement in this field. The point has been considered afresh on at least two occasions by the Court of Appeal . . .

Both the *Hispano* case and the *Congreso* case are, I understand, on the way to the House of Lords. Unless the House of Lords decide otherwise, it seems to me to have been clearly established by successive decisions in the Court of Appeal that prior to the passing of the State Immunity Act, 1978, a foreign state had no absolute immunity in the English Courts, whether in actions in rem or in actions in personam.

As for Mr. Hoolahan's second argument, I was not convinced that there is any relevant distinction between s. 3 and s. 10 of the State Immunity Act. It is clear that s. 3 is not retrospective; no more I think is s. 10; but even if it were, it would not be legitimate to infer from that, that Parliament was intended to change the law by s. 3. Parliament is of course presumed to know the state of the law. But there is no presumption that, by legislating, Parliament intends to change the law; and I do not see why that inference should be drawn in relation to one provision of an Act merely because other provisions in the same Act are said to have been given retrospective effect.<sup>1</sup>

On the basis of the restrictive theory of immunity, it was then argued that a contract for building work at an embassy was an act *iure imperii*, an argument even more summarily dismissed.

<sup>1</sup> [1980] 2 Lloyd's Rep. at pp. 394-5, 396. But *Hispano-Americana Mercantil* has since been settled before getting to the House of Lords. The House's chance to pronounce on the common law now rests largely on *Congreso*, an action *in rem* in very special circumstances.



To my mind, it is hard to imagine a clearer case of an act or transaction of a private or commercial nature than the repairs to the ambassador's residence. The case is on all fours with the *Empire of Iran* case. It follows that the defence of sovereign immunity is not available in this case.<sup>1</sup>

*Extradition—United Kingdom–United States Extradition Treaty, 1972, Art. III—principle of double criminality*

*Case No. 9. R. v. Governor of Pentonville Prison, ex parte Budlong and Kember*, [1980] 1 All E.R. 701; [1980] 1 W.L.R. 1110; [1980] 2 C.M.L.R. 125, D.C. The applicants were senior members of the Church of Scientology; in that capacity they procured certain members of their Church to break into United States Government offices and to steal copies of confidential documents. The break-in was part of a Church campaign against the United States Government, and the documents related to matters in the dispute. The United States sought their extradition on charges of burglary, under the Extradition Treaty of 8 June 1972.<sup>2</sup>

The applicants sought to rely on a number of grounds to avoid extradition: the absence of any formal document before the magistrate setting out the particulars of the offences;<sup>3</sup> that the offences were of a political character;<sup>4</sup> that the extradition was really sought to punish them for stealing confidential information, and thus involved the enforcement by United Kingdom courts of a foreign public law;<sup>5</sup> that the extradition of one of the applicants, a British national, was a restriction on free movement within the European Community under Article 48 of the European Economic Community Treaty, and was not justified on any ground of the public policy of the forum.<sup>6</sup> Each of these arguments failed; of more interest was an argument based on the principle of double criminality.

It was argued that since the United States offence of burglary did not require entry as a trespasser, which the English offence did, there was no corresponding English offence within Article III (1) of the Treaty. In other words, what was required for extradition was an exact correspondence between the elements of the offence in the law of each jurisdiction: it was not enough that in fact the applicant was guilty of both offences.

As this argument demonstrated, the law of extradition is poised uneasily between being a set of general 'rules' or 'principles' merely exemplified in extradition laws and treaties, and being a positive arrangement with no general normative basis, dependent on the terms of the particular law or treaty. If the former view is correct, then one would not expect any requirement of exact correspondence: at most, general similarity of offence would suffice.<sup>7</sup> Such a strict

<sup>1</sup> At p. 396. Lloyd J. pointed out that, although the State Immunity Act 1978 did not govern the substantive law, it did provide a method for service, proceedings having been commenced after the Act came into force (at p. 397): see s. 23 (3) and (4).

<sup>2</sup> *United Kingdom Treaty Series*, No. 16 (1977); implemented by the United States of America (Extradition) Order 1976 (S.I. 1976 No. 2144).

<sup>3</sup> See [1980] 1 All E.R. at pp. 705–8.

<sup>4</sup> At pp. 712–14.

<sup>5</sup> At pp. 714–15.

<sup>6</sup> At pp. 715–17, distinguishing *R. v. Bouchereau*, [1978] Q.B. 732, E.C.J., on the ground that extradition is 'far more analogous to the implementation of domestic criminal law than to deportation', and is therefore not subject to the constraints of Art. 48. On Art. 48 and the surrender of deserters under the Visiting Forces Act 1952, see *Re Virdee*, [1980] 1 C.M.L.R. 709, reaching a similar conclusion.

<sup>7</sup> Cf. I. A. Shearer, *Extradition in International Law* (1971), pp. 141–7, for a convincing exposition of double criminality on this hypothesis.

requirement, as Griffiths J. pointed out, would make extradition depend on the 'unlikely foundation that foreign definitions of crimes, often in different languages and operating in very different legal systems, will accord with English definitions'.<sup>1</sup>

If, on the other hand—and this seems to be the better view—extradition depends on the terms of the particular instruments, neither the Extradition Act nor the 1972 Treaty imposed any such requirement. Article III of the Treaty provides that:

(1) Extradition shall be granted for an act or omission the facts of which disclose an offence within any of the descriptions listed in the Schedule annexed to this Treaty . . . or any other offence, if: (a) the offence is punishable under the laws of both Parties by imprisonment or other form of detention for more than one year or by the death penalty; (b) the offence is extraditable under the relevant law, being the law of the United Kingdom or other territory to which this Treaty applies by virtue of sub-paragraph (1) (a) of Article II; and (c) the offence constitutes a felony under the law of the United States.

The emphasis is on the *facts* of the offence meeting 'any of the *descriptions* . . . in the Schedule'—the descriptions being contained in an international treaty rather than a municipal law. As Griffiths J. concluded:

double criminality in our law of extradition is satisfied if it is shown: (1) that the crime for which extradition is demanded would be recognised as substantially similar in both countries, and (2) that there is a *prima facie* case that the conduct of the accused amounted to the commission of the crime according to English law.<sup>2</sup>

The only general principle here was the principle of liberal interpretation of treaty provisions,<sup>3</sup> a point perhaps not fully reflected in Griffiths J.'s reference to 'our law of extradition'. All that was at stake was the principle of double criminality under the Treaty of 1972.<sup>4</sup>

JAMES CRAWFORD

<sup>1</sup> At p. 712.

<sup>2</sup> Loc. cit., citing *inter alia* *Re Arton* (No. 2), [1896] 1 Q.B. 509 at p. 517, *per* Lord Russell C.J.

<sup>3</sup> At p. 711.

<sup>4</sup> Cf. *State v. Kelly*, [1971] I.R. 132 (where the foreign offence was required to 'correspond with' an offence under local law).

## DECISIONS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS DURING 1980\*

*Right to a fair trial (Article 6 (1))—access to a court in criminal proceedings—  
waiver of the right to trial made under constraint*

*Case No. 1. De Weer case.*<sup>1</sup> The Court held that the right to a fair trial guaranteed by Article 6 (1) had been infringed because the applicant's waiver of a trial in criminal proceedings against him had been made under constraint.

The applicant, a Belgian national, was a butcher in Louvain. In 1974 a Ministry Inspector visited his shop and found that the applicant was selling pigmeat at a higher price than the law allowed. The matter was reported to the local *procureur du Roi* (public prosecutor) who ordered the provisional closure of the applicant's shop within 48 hours. The closure would be avoided or cease upon payment within eight days of 10,000 BF by way of friendly settlement or, in default of any such payment, would cease upon judgment being given in the criminal proceedings that would then be brought against him. To avoid closure, the applicant paid the proposed sum in good time. No criminal proceedings were brought and the case was closed.

The applicant claimed that Belgium had infringed, *inter alia*, Article 6 in several respects in its treatment of him. The Commission expressed the unanimous opinion that the combined use of the procedures for settlement and for provisional closure of the business infringed the applicant's right to a fair trial in Article 6 (1). It concluded that no breach of Article 6 (2) had occurred and found no need to examine the claim under Article 6 (3). The Commission referred the case to the Court. By this time the applicant had died, but his widow and family indicated that they considered themselves as having a material and moral interest in the completion of the proceedings.

On the question of a breach of Article 6 (1), the Court considered first whether that provision applied to the applicant's case. Was he subject to a 'criminal charge' when the conduct complained of occurred? The Belgian Government argued that he was not. It pointed out that the threatened closure of the applicant's shop and the sum of money paid by the applicant to avoid prosecution were not classified as criminal sanctions in Belgian law. It also noted that no charge had been laid against the applicant by the time that he paid the 10,000 BF. The Court discounted this evidence. The concept of a 'criminal charge' was an autonomous Convention one and was to be given a 'substantive' rather than a 'formal' meaning (para. 43, judgment). In the present case, there existed 'a combination of concordant factors conclusively demonstrating that the case [as it existed when the money was paid] had a criminal character under the Convention' (para. 45).

\* © Professor D. J. Harris, 1981.

<sup>1</sup> A. 6903/75. Decision as to admissibility: *Yearbook of the European Convention on Human Rights*, 20 (1977), p. 280. Report of the Commission adopted on 5 October 1978. European Court of Human Rights (cited in these notes as E.C.H.R.), Judgment of 27 February 1980. French text authentic. The Court consisted of the following Chamber of Judges: Mosler (President); Zekia, Ryssdal, Ganshof van der Meersch, Teitgen, Gölcüklü and Pinheiro Farinha (Judges).



Moreover, a 'charge' could be said to be brought when 'official notification is given to an individual by the competent authority of an allegation that he has committed a criminal offence' (para. 46). This occurred in the present case upon the applicant's receipt of the decision of the *procureur du Roi*. He was, therefore, protected by Article 6 (1) when he paid the 10,000 BF by which he effectively waived his right to a trial of the allegations of criminal conduct made against him.

The applicant therefore was entitled to the right of access to a court which the Court had read into Article 6 (1) in the *Golder* case.<sup>1</sup> The right to be tried by a court (and not by a Government Inspector or a *procureur du Roi*) was, however, 'no more absolute in criminal than in civil matters'; it was subject to implied limitations, such as a decision by the competent authority not to prosecute or an order by a court for the discontinuance of the proceedings. The question in this case was whether an accused could waive the right to a trial before a court which he was guaranteed by Article 6 (1) and whether the applicant had done so here by paying the 10,000 BF by way of settlement. The Court agreed that a waiver *could* be consistent with Article 6 (1), but only if it were made in the absence of constraint:

In the Contracting States' domestic legal systems a waiver of this kind is frequently encountered both in civil matters, notably in the shape of arbitration clauses in contracts, and in criminal matters in the shape, *inter alia*, of fines paid by way of compensation. The waiver, which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the Convention; on this point the Court shares the view of the Commission . . .

Nevertheless, in a democratic society too great an importance attaches to the 'right to a court' . . . for its benefit to be forfeited solely by reason of the fact that an individual is a party to a settlement reached in the course of a procedure ancillary to court proceedings. In an area concerning the public order (*ordre public*) of the member States of the Council of Europe, any measure or decision alleged to be in breach of Article 6 calls for particularly careful review . . . The Court is not unaware of the firmness with which the Belgian courts have condemned, on the basis of Article 8 of the Constitution and Article 6 of the Convention, failure to respect the 'right to a court' in private legal relationships . . . At least the same degree of vigilance would appear indispensable when someone formerly 'charged with a criminal offence' challenges a settlement that has barred criminal proceedings. Absence of constraint is at all events one of the conditions to be satisfied; this much is dictated by an international instrument founded on freedom and the rule of law . . .

The Court points out that while the prospect of having to appear in court is certainly liable to prompt a willingness to compromise on the part of many persons 'charged with a criminal offence', the pressure thereby brought to bear is in no way incompatible with the Convention; provided that the requirements of Articles 6 and 7 are observed, the Convention in principle leaves the Contracting States free to designate and prosecute as a criminal offence conduct not constituting the normal exercise of one of the rights it protects. . . . (paras. 49-51.)

Applying this approach to the facts before it, the Court concluded that the smallness of the amount which the applicant was asked to pay to avoid prosecution coupled with the severity of the consequence of allowing the case to go for trial (mainly the closure of the applicant's shop while proceedings were pending, with its serious financial consequences) meant that the applicant was improperly tempted to forgo the trial guaranteed to him by Article 6 and hence the chance to clear his name. The Court therefore held, unanimously, that there had been a breach of Article 6 (1).

<sup>1</sup> E.C.H.R., Judgment of 21 February 1975.

In view of its holding on Article 6 (1), the Court found it unnecessary to consider the claims based upon other guarantees in the Convention.

Finally, the Court held, unanimously, in favour of the claim to 'just satisfaction' under Article 50. The Court required Belgium to reimburse the 10,000 BF paid by the applicant and to pay the travel and accommodation expenses incurred at the time of the hearing of the case before the Commission.

In order to reach the merits of the case, the Court had first rejected certain preliminary arguments made by the Belgian Government. The Court held, unanimously, that the applicant had not failed to exhaust local remedies. Although he could have applied to the Belgian *Conseil d'État* for a declaration of annulment of the Decree of 9 August 1974 which created the criminal offence he was alleged to have committed, this would not have offered a sufficient remedy since his concern was not with the offence but with the way in which the Decree was administered (closure pending payment in lieu of prosecution) and this was the subject of a different law. Similarly, the availability of an action for restitution to recover the 10,000 BF paid by way of settlement would not have met the applicant's 'fair trial' claim. The Court also dismissed a request that the case be struck off the list. This request had been made by the Belgian Government primarily on the basis that the Belgian *Conseil d'État* had annulled the Decree of 9 August 1974 while the applicant's case was pending before the Commission. The Court refused the request mainly because, as it had pointed out when considering the local remedies argument, the annulment of the 1974 Decree did not affect the applicant's claim that his right to a fair trial had been infringed, which was an issue that remained to be resolved by the Court.

The Court and the Commission were each unanimously of the opinion that a breach of the Convention had occurred in this case. The Court indicated in its judgment that it was ruling only on the question whether the agreed payment of 10,000 BF *coupled with* the threat of closure amounted to constraint. None the less, it may be inferred from its judgment that the Court would not have held that the payment of the 10,000 BF alone was contrary to Article 6. The Court expressly left open the question whether just the threat of closure would have been sufficient. The Commission was more forthcoming, stating that neither factor taken by itself would have evidenced sufficient constraint. The payment of a fine 'out of court' in place of prosecution is a familiar device in minor road-traffic cases and presents no real threat, as the Court recognized, to the right of access to the courts provided that the difference between the court and 'out of court' fines is not too large. Likewise, 'plea bargaining' is probably consistent with the Court's judgment, and properly so. By itself, the closure of commercial premises pending the outcome of criminal proceedings would only raise a question of constraint if proceedings were considerably accelerated by a guilty plea. The administrative closure of such premises without a court order for reasons, for example, of public health might involve the different question of the determination of 'civil rights' contrary to Article 6 (whether criminal proceedings were pending or not).<sup>1</sup>

The case is also of interest for other reasons. First, it confirms the flexible approach that the Strasbourg Court is prepared to take to the question, when does a person begin to be subject to a 'criminal charge'? In the absence of any arrest, the

<sup>1</sup> On 'civil rights' and commercial activities, see the *König* case, E.C.H.R., Judgment of 28 June 1978. In English law, even an *emergency* closure of food premises for health reasons is subject to a court order: Food and Drugs (Control of Food Premises) Act 1976, s. 2.

Court was prepared to go back to the point where the applicant was notified formally of an allegation that he had committed a criminal offence. Secondly, the Court rejected an argument put at one stage by the Belgian Government to the effect that 'he who can do more, can do less'. Such an *a fortiori* argument, the Court said, does not necessarily apply in the area of human rights (para. 53). Thus, in the context of the Convention, it did not follow from the fact that the death penalty was permitted (Article 2) that other lesser forms of ill treatment were to be regarded as being lawful.

*The right to legal assistance in criminal cases (Article 6 (3) (c))—obligation to provide effective assistance—the timing of objections as to admissibility—compensation under Article 50*

*Case No. 2. Artico case.*<sup>1</sup> The Court held that Italy had infringed Article 6 (3) (c)<sup>2</sup> by not providing the applicant with effective legal representation in appeal proceedings.

In 1965 and 1970 the applicant, an Italian national, was convicted by the Verona District Judge (*pretore*) of several offences involving fraud committed in 1964. He was given prison sentences. His appeals to the Verona Criminal Court were rejected in 1969 and 1971. The applicant then, in December 1971, began to serve his sentences. The following year he appealed to the Italian Court of Cassation. He relied on an alleged procedural irregularity and on the statute of limitations. As to the latter, he argued that his 1964 offences had lapsed for want of prosecution by the time that he began to serve his sentences for them. In 1972 the Court of Cassation rejected his appeal, dealing only with the issue of procedural irregularity. In 1975 the same Court allowed a further appeal by the applicant, accepting the statute of limitations argument that he had made earlier (although not very clearly or forcefully) so far as it applied to most of his convictions. The applicant was released from prison shortly afterwards. He had by the time of his release served a little over a year's imprisonment more than he should have served for the convictions which had not been overturned.

In his application to Strasbourg, the applicant alleged, *inter alia*, a breach of Article 6 (3) (c), claiming that he had not been provided with legal representation before the Court of Cassation during its consideration of his case from 1972 onwards. The Commission expressed the opinion, unanimously, that a breach of Article 6 (3) (c) had occurred and referred the case to the Court.

Under Italian law the applicant, who was without means, was entitled to free legal aid. Accordingly, in 1972 the Court of Cassation, at the applicant's request, appointed a lawyer to represent him in his appeal. Unfortunately the lawyer never acted for the applicant, claiming other legal commitments and ill health. Despite constant requests by the applicant, the Court refused to appoint another lawyer to replace him.

<sup>1</sup> A. 6694/74. Decision as to admissibility: *Decisions and Reports of the European Commission of Human Rights*, 8 (1977), p. 73. Report of the Commission adopted on 8 March 1979. E.C.H.R., Judgment of 13 May 1980. French text authentic. The Court consisted of the following Chamber of Judges: Wiarda (President); Balladore Pallieri, Zekia, Bindschedler-Robert, Liesch, Gölcüklü and Pinheiro Farinha (Judges).

<sup>2</sup> Article 6 (3) (c) reads: 'Everyone charged with a criminal offence has the following minimal rights: . . . (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require . . . '.



The Italian Government argued before the Court that its obligation under Article 6 (3) (c) had been met when it appointed a lawyer for the applicant in 1972. The Court rejected this argument:

The Court recalls that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive . . . As the Commission's Delegates correctly emphasised, Article 6, para 3 (c) speaks of 'assistance' and not of 'nomination'. Again, mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations. Adoption of the Government's restrictive interpretation would lead to results that are unreasonable and incompatible with both the wording of sub-paragraph (c) and the structure of Article 6 taken as a whole; in many instances free legal assistance might prove to be worthless. (para. 33, judgment.)

The Court noted that the applicant in this case had not had the assistance of the lawyer appointed for him at any time and was forced to plead the case himself; he could not therefore be said to have been provided with the effective 'assistance' of a lawyer as required by Article 6 (3) (c).

Alternatively, the Italian Government argued that the applicant, although indigent, was not entitled to legal assistance under Article 6 (3) (c) because 'the interests of justice' did not require it. In its view, the case was so straightforward as to make legal assistance unnecessary. Again, the Court disagreed. It noted that the Court of Cassation had itself thought otherwise when appointing a lawyer for the applicant and that the lawyer who was appointed had asserted that it would have been a very demanding commitment. Examining the facts of the case itself, the Court observed that a qualified lawyer would have been able to clarify the arguments that the applicant had presented to the Court of Cassation. In particular, he might have been able to emphasize the statute of limitations argument so that it would have been taken note of and used by the Court of Cassation to overturn the applicant's conviction more quickly than had been the case. Although one could not be sure that this would have happened, it was not necessary to show actual prejudice for there to be a violation of Article 6 (3) (c); it was sufficient that 'it appears plausible in the particular circumstances' that a qualified lawyer would have helped (para. 35). What the Court of Cassation should have done was to have replaced the lawyer originally appointed or to have caused him to act; it was not free just to shrug its shoulders: 'compliance with the Convention called for positive action' (para. 36). Accordingly the Court held, unanimously, that Article 6 (3) (c) had been infringed.

The Court rejected, unanimously, certain preliminary arguments put by the Italian Government before considering the merits of the applicant's claim. It dismissed a plea that local remedies had not been exhausted, in accordance with its established jurisprudence,<sup>1</sup> on the ground that Italy had not raised the issue of local remedies before the Commission earlier in the proceedings. Although the Government had put an argument based upon non-exhaustion of local remedies to the Commission, this had been about a complaint under Article 5, not that under Article 6 now being considered by the Court. The Court also dismissed pleas that the case be rejected (i) *ratione temporis* and (ii) on the basis of the

<sup>1</sup> See the *Vagrancy* cases, E.C.H.R., Judgment of 8 June 1971.

six-months rule. The Italian Government argued (i) that the Italian declaration accepting the right of individuals to petition against it<sup>1</sup> related only to facts occurring after 31 July 1973 (which, it claimed, was not true in this case) and (ii) that the claim had not been brought within the six-month period prescribed by Article 26. Without judging the merits of these arguments, the Court ruled against them on the ground that they too had not been presented in good time. Although they had been raised (unlike the argument based upon local remedies) before the Commission, they had, for no good reason, been made when the case was being considered by the Commission on the merits and not at the admissibility stage. Acting in accordance with Article 29 of the Convention, the Commission had, at the merits stage, considered the Italian Government's arguments but rejected them in the absence of a *unanimous* vote in their favour.<sup>2</sup> In the Court's opinion, the Italian Government should have advanced such arguments at the admissibility stage for them to be considered by the Court:

The Court observes that the structure of the machinery of protection established by Sections III and IV of the Convention is designed to ensure that the course of the proceedings is logical and orderly. The function of sifting which Articles 26 and 27 assigned to the Commission is the first of its tasks . . . Admittedly Article 29, which has been in force since 21 September 1970, provides for a subsequent review of admissibility but it makes an '*a posteriori*' rejection of an application conditional on a unanimous vote by the Commission. The stringency of this condition, which marks a departure from the principle of decision by a majority laid down in Article 34, demonstrates that the spirit of the Convention requires that respondent States should normally raise their preliminary objections at the stage of the initial examination of admissibility, failing which they will be estopped.

It is true that the reason prompting a preliminary objection sometimes comes to light only after the decision accepting the application: for example, a reversal of domestic case-law may disclose the existence of a hitherto unknown remedy . . . or an applicant may formulate a new complaint whose admissibility the respondent Government have not yet had the opportunity of contesting . . . In such cases, the circumstances do not permit reliance on grounds of inadmissibility at an earlier date; . . .

However, the present case does not furnish an example of a situation of this kind. Nothing prevented the Government from inviting the Commission, before 1 March 1977, to reject the application *ratione temporis* or for failure to comply with the six months' time-limit. Yet the Government unnecessarily deferred doing this until 8 December 1978 with the consequence that their plea could have succeeded only in the event of a unanimous vote (Article 29). The Government thereby lost the advantage of a decision by a majority (Article 34) and they cannot be taken to have recovered it by applying to the Court (Rule 20, para. 1 of the Rules of Court); to hold otherwise would lead to a result that would be incompatible with the structure of the Convention and with a proper administration of justice. (para. 27.)

In this case, too, the Court and the Commission were unanimous. The case confirms that the guarantees in Article 6 apply to appeal proceedings so far as such proceedings are provided. It confirms what one would suppose the guarantee of free legal aid in criminal proceedings in Article 6 (3) (c) to mean in other respects. The Court's judgment underlines the need for the defendant State to plead objections as to admissibility at the correct time if they are to be reconsidered by

<sup>1</sup> *Yearbook of the European Convention on Human Rights*, 16 (1973), p. 10.

<sup>2</sup> It is not clear whether there was the simple majority of members present and voting which would have been the requirement if the pleas had been made at the admissibility stage: Article 34.

the Court. It would have been particularly interesting to have had a judgment on the objection *ratione temporis*.

*Right to liberty (Article 5)—the meaning of liberty—the grounds for deprivation of liberty under Article 5 (1)—exhaustion of local remedies (Article 26)—compensation under Article 50*

*Case No. 3. Guzzardi case.*<sup>1</sup> The Court held that the restriction of the applicant to a small part of an island off the coast of Sardinia as a preventive measure of public security because he was suspected of belonging to the Mafia was a breach of Article 5.

The applicant, an Italian national, was arrested in 1973 on kidnapping charges. In 1979 he was convicted and sentenced by the Milan Court of Appeal to eighteen years' imprisonment. His application concerned his detention before his trial. Under Italian law, he could only be detained in prison on remand for two years. In February 1975, after this period had expired, the applicant was removed from prison and taken to the island of Asinara, close to Sardinia. Acting under Italian laws of 1956 and 1965, the Milan Regional Court directed that he be placed under special supervision there for three years. Under the 1956 and 1965 laws, individuals may be ordered to live in one of several designated areas in Italy if, *inter alia*, they are 'idlers', or 'habitual vagrants fit for work', or 'regularly and notoriously involved in illicit dealings', or 'individuals who must be considered habitually living, even in part, on the proceeds of crime', or persons 'whose outward conduct gives good reason to believe that they have criminal tendencies', or—as in the applicant's case—persons 'whom there are strong reasons to suspect of belonging to Mafia-type associations'.

The designated area to which the applicant was sent was just a part of the island of Asinara. The island as a whole covers about 50 sq. km.; the part to which the applicant and others subjected to the same regime of special supervision were restricted was about 2½ sq. km. in area. Other restrictions upon the applicant's freedom of movement were described by the Court as follows:

Whilst the area around which the applicant could move far exceeded the dimensions of a cell and was not bounded by any physical barrier, it covered no more than a tiny fraction of an island to which access was difficult and about nine-tenths of which was occupied by a prison. Mr. Guzzardi was housed in part of the hamlet of Cala Reale which consisted mainly of the buildings of a former medical establishment which were in a state of disrepair or even dilapidation, a *carabinieri* station, a school and a chapel. He lived there principally in the company of other persons subjected to the same measure and of policemen. The permanent population of Asinara resided almost entirely at Cala d'Oliva, which Mr. Guzzardi could not visit, and would appear to have made hardly any use of its right to go to Cala Reale. Consequently, there were few opportunities for social contacts available to the applicant other than with his near family, his fellow 'residents' and the supervisory staff. Supervision was carried out strictly and on an almost constant basis. Thus, Mr. Guzzardi was not able to leave his dwelling between 10 p.m. and 7 a.m. without giving prior notification to the authorities in due time. He had to report to the authorities twice a day and inform them of the name and number of his correspondent whenever he wished to use the telephone. He needed the consent of the authorities for each of his trips to Sardinia and the mainland, trips which were rare and, understandably, made under the strict

<sup>1</sup> A. 7367/76. Decision as to admissibility: *Yearbook of the European Convention on Human Rights*, 20 (1977), p. 462. Report of the Commission adopted on 7 December 1978. E.C.H.R., Judgment of 6 November 1980. French text authentic. The case was heard by the plenary Court.



supervision of the *carabinieri*. He was liable to punishment by 'arrest' if he failed to comply with any of his obligations. (para. 95, judgment.)

The applicant was kept on Asinara for more than sixteen months. He was then transferred to Force, another designated area, for the remainder of his three years.

In his application, the applicant alleged a breach of Articles 3, 8 and 9 of the Convention. He did not mention Article 5 specifically. The question of a breach of Article 5 was raised by the Commission *ex officio*. The Commission expressed the opinion that Article 5 had been infringed, but that no other breach had occurred. It reached this conclusion unanimously, except that there was one abstention on the question whether Article 8 had been infringed. The case was referred to the Court by the Commission.

The crucial question for the Court on the alleged violation of Article 5 was whether the applicant had been 'deprived of his liberty', as is required for the guarantee in Article 5 to apply. The question was whether he was sufficiently confined to place him within the protection of Article 5 of the Convention, by which Italy was bound, or whether this was really a case of interference with the applicant's freedom of movement subject to Article 2 of the Fourth Protocol to the Convention,<sup>1</sup> to which Italy had not subscribed. By a majority of 11 votes to 7,<sup>2</sup> the Court held that this was a case of deprivation of liberty. The Italian Government's forceful argument to the contrary was summarized by the Court as follows:

The distinguishing characteristic of freedom was less the amount of space available than the manner in which it could be utilised; a good many districts in Italy and elsewhere were less than 2.5 sq. km. in area. The applicant was able to leave and return to his dwelling as he wished between the hours of 7 a.m. and 10 p.m. His wife and son lived with him for fourteen of the some sixteen months he spent on Asinara; the inviolability of his home and of the intimacy of his family life, two rights that the Convention guaranteed solely to free people, were respected. Even as regards his social relations, he was treated much more favourably than someone in penal detention: he was at liberty to meet, within the boundaries of Cala Reale, the members of the small community of free people—about two hundred individuals—living on the island, notably at Cala d'Oliva; to go to Sardinia or the mainland if so authorised; to correspond by letter or telegram without any control; to use the telephone, subject to notifying the *carabinieri* of the name and number of his correspondent. The supervision of which he complained constituted the *raison d'être* of the measure ordered in his respect. (para. 91.)

The Court, while acknowledging that this reasoning was 'not without weight' (para. 94), took another view. The 'difference between deprivation of and restriction upon liberty' was 'one of degree or intensity . . . not one of nature or substance' (para. 93) and, on balance, the applicant's fell on the former side of the line. While it was not possible to refer to any one of the circumstances of the applicant's detention as amounting to a state of 'deprivation of liberty', cumulatively they had this effect. 'In certain respects the treatment complained of resembled', the Court thought, 'detention in an "open prison" or committal to a disciplinary unit in the army' (para. 95), which would clearly come within Article 5. In this connection, the Court agreed with the Commission's distinction

<sup>1</sup> Article 2 (2) reads: 'Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence'.

<sup>2</sup> Judges Zekia, Sir Gerald Fitzmaurice, Bindschedler-Robert, Teitgen, García de Enterría, Matscher and Pinheiro Farinha dissented.

between the conditions which the applicant experienced at Cala Reale and those to which he was later subjected at Force. Whereas the former amounted to a 'deprivation of liberty', the latter, which were less restrictive, did not. The seven dissenting judges were persuaded by the Italian Government's arguments.

The Court then considered whether the treatment of the applicant could be brought within any of the categories of 'deprivation of liberty' permitted by Article 5. The Court rejected, unanimously, the Italian Government's argument that the applicant's detention could be seen as that of a 'vagrant' (Article 5 (1) (e)). Acting *ex officio*, the Court also held that none of the other categories applied. Most significantly, it held, by 12 votes to 6,<sup>1</sup> that Article 5 (1) (c) did not apply. Although the applicant was still suspected of kidnapping while detained at Cala Reale, this was not the reason for his detention. Moreover, the Court was not sympathetic to the argument favoured by at least one dissenting Judge (Judge Bindschedler-Robert) that the detention was for the 'prevention of crime'. In the Court's words, that wording in Article 5 (1) (c) does not permit 'a policy of general prevention directed against an individual or a category of individuals who, like *Mafiosi*, present a danger on account of their continuing propensity to crime; it does no more than afford the Contracting States a means of preventing a concrete and specific offence' (para. 102).

Finally, ruling on the question of a breach of Article 5 (1) as a whole, the Court held, by 10 votes to 8,<sup>2</sup> that a breach had occurred.

The Court then considered and rejected the allegations of other breaches made by the applicant. It held, unanimously, that there had been no breaches of Articles 3, 6 and 9. It held, by 17 votes to 1,<sup>3</sup> that Article 8 had not been infringed.

At the outset, the Court had had to consider a number of preliminary Government pleas, all of which it rejected. In respect of the most disputed of these pleas, the Court rejected, by 10 votes to 8,<sup>4</sup> the Government's objection that domestic remedies had not been exhausted. The Italian Government's main argument was that the applicant had not, in his appeals to the Italian courts, challenged his 'deprivation of liberty' at Cala Reale (which was what was being complained of before the Court); he had instead asked that the order placing him under the system of special supervision (the legality of which system was not disputed under the Convention) be quashed. The Court rejected this argument. Although the applicant had not 'expressly' raised the question of his detention at Cala Reale, Article 26 'should be applied with a certain degree of flexibility and without excessive regard for matters of form'. In his appeals against the order placing him under special supervision, the applicant had 'complained of a series of factors which, taken together, could in the Court's opinion be regarded' as raising that question 'in substance'. He had thereby provided the Italian courts with the opportunity of 'putting right the violations alleged against them', which was the object of the local remedies rule in international law (paras. 72-3). The Italian judge—Judge Balladore Pallieri—was one of those who dissented:

If the applicant's requests to the national courts are examined, it can be seen at once that

<sup>1</sup> The dissenting judges included Judges Bindschedler-Robert, Teitgen, García de Enterría and Matscher.

<sup>2</sup> The dissenting judges included the seven listed at p. 336 n. 2, above.

<sup>3</sup> Judge Zekia dissented.

<sup>4</sup> The dissenting judges included Judges Balladore Pallieri, Cremona, Bindschedler-Robert, Teitgen and García de Enterría.

they sought first and foremost revocation of the compulsory residence order: that was his principal request, even before the Court of Appeal. They thus bore on an issue that has no connection with the issue facing our Court which, as we have said previously, is not concerned with the lawfulness *in abstracto* of the Italian Act of 1956. . . .

. . . it is also true that the applicant asserted that he was physically and mentally a prisoner on Asinara and was vegetating there in conditions worse than those of his detention on remand and that he described Cala Reale as a 'veritable concentration camp'. However, we can find an explanation of what he meant by these remarks in his appeal to the Court of Cassation: in that appeal he relied not on the first and second paragraphs of Article 13 of the Italian Constitution, which relate to the protection of individual liberty against any measure involving detention, but on the fourth paragraph which stipulates: 'The infliction of any physical or mental violence on persons subjected to any form of restriction on their liberty shall be a punishable offence'.

Finally, account should be taken of the fact that when Mr. Guzzardi made two further applications to the Milan Regional Court on 14 November 1975—applications that did actually concern the issue raised before us—he obtained a transfer elsewhere and the camp of Asinara was eventually closed. Had the matter been pleaded in the proper terms, the domestic remedy would thus have resulted in a finding in favour of the applicant and there would have been no call to institute proceedings before the international institutions.

The Court held, by 12 votes to 6,<sup>1</sup> that the applicant should be paid 1 million Lire by way of just satisfaction under Article 50. It made this token award mainly in respect of the costs borne by the applicant in pursuing his claim.

There would seem to have been no doubt that the 'freedom of movement' guarantee in Article 2 of the Fourth Protocol would have protected the applicant in this case, had Italy accepted it. The Court reached its conclusion that a breach of Article 5 had occurred by a far less emphatic majority than the Commission had. The contrast between the conditions which the applicant encountered at Cala Reale and those to which he was subject later at Force, which was stressed by the Commission, is instructive. At Force, the designated area was much larger and there was not the same close surveillance. The main restriction was his obligation to report twice a day to the police. The population of the area was such that he was able to make contact with people not a part of the system of special supervision much more easily than had been the case at Cala Reale. By contrast, the constant surveillance within a small area and the limitations upon his contact with others at Cala Reale presented the characteristics of a prison camp rather than an area to which a person was restricted in his movements.

The judgments of more than one dissenting judge were coloured by the Mafia background of the case. Judge Sir Gerald Fitzmaurice thought that the 'Court failed to give adequate weight—if weight at all—to the fact that the applicant was a terrorist and Mafioso'. He considered that these were factors that could be taken into account in doubtful cases. He also thought that the award of compensation to the applicant carried the case into the region of 'cloud-cuckoo land'. In similar vein, Judge Bindschedler-Robert took the view that the applicant's treatment could be justified under the 'prevention of crime' limb of Article 5 (1) (c), even though the detention of the applicant was not a preliminary to trial. In her view, the wording of Article 5 (1) (c) did not 'prevent a democratic State from taking the requisite protective measures when organised crime threatens to destroy its legal institutions'. The problem with such an approach is that Article 15 of the Convention cannot easily be read as including the threat of organized crime or

<sup>1</sup> The dissenting judges included Judges Sir Gerald Fitzmaurice and Pinheiro Farinha.



(at the level of occasional kidnappings) terrorism within the idea of 'a public emergency threatening the life of the nation'. An applicant is entitled to the guarantees in the Convention interpreted in the ordinary way, whatever his connections with organized crime, etc.

*Right to respect for privacy (Article 8)—right to marry (Article 12)—exhaustion of local remedies*

*Case No. 4. Van Oosterwijk case.*<sup>1</sup> The Court held that it was not called upon to consider the merits of the case because local remedies had not been exhausted. The Commission had expressed the opinion that Belgium had infringed Articles 8 and 12 by not making it possible in its law for the applicant, a transsexual who had changed his sex by surgery, to change his civil status to that of a man.

The applicant, a Belgian national, was born a female in 1944. From infancy he had thought of himself as a male and his status as a transsexual was later medically confirmed. Between 1970 and 1973, on medical advice, he underwent surgical treatment, lawful under Belgian law, by which he was given the primary and secondary physical characteristics of a male. Although unable to procreate, he was enabled to have sexual intercourse as a male. Since then, the applicant had taken up life as a man and had sought to have his status as such recognized by Belgian law. Since Belgium has no law dealing specifically with the status of a person who changes his sex, the applicant filed a 'petition for rectification of a civil status certificate' in which he requested the Brussels Court of First Instance to order that his birth certificate be amended to read 'a child of the male sex with the forenames Daniel, Julien, Laurent, born on . . . son of . . .'. His petition was dismissed because it had not been proved, as Belgian law required, that there had been an error in describing him as a female etc., when the certificate was issued shortly after his birth. His appeal was rejected by the Belgian Court of Appeal for the same reason and because Belgian law did not allow account to be taken of 'artificial' changes in an individual's anatomy. The applicant did not appeal further to the Belgian Court of Cassation. Nor did he seek authorization from the Belgian Government to change his forenames, as he might have done under a 1974 Belgian law.

The applicant complained to the Commission of breaches of Articles 3, 8 and 12 of the Convention on the above facts. The Commission expressed the opinion, unanimously, that there had been a breach of the right to privacy in Article 8 and, by 7 votes to 3, that Article 12 had been infringed as well. In these circumstances the Commission took the view that it was not necessary to consider whether a breach of Article 3 had also occurred, particularly since the case did not appear as serious as cases normally thought to fall within that Article. The Commission's opinion is founded on the humiliating consequences for the applicant of the failure of Belgian law to recognize fully his change of sex. It was true that he could obtain a short birth certificate which did not mention his descent ('daughter of . . .') and that he could apply under the 1974 law to have his first names changed. But he still needed his full birth certificate for certain legal purposes (e.g. the sale of land), and certain administrative documents (e.g. the electoral roll) continued to refer to the applicant as a female. As a result he had on occasions, sometimes in

<sup>1</sup> A. 7654/76. Decision as to admissibility: *Yearbook of the European Convention on Human Rights*, 21 (1978), p. 476. Report of the Commission adopted on 1 March 1979. E.C.H.R., Judgment of 6 November 1980. French text authentic. The case was heard by the plenary Court.

public, to explain the reason for the discrepancy between his physical appearance and his civil status. Although Article 8 was primarily negative in its requirements, it could require positive action by a State in some cases. This was so, *inter alia*, where documents identifying a person by sex were required by law. In such a case there was a positive obligation to act to allow the documents to be changed when they would, if unchanged, affect respect for a person's privacy.

The Commission defined and applied the concept of 'privacy' for the purposes of Article 8 as follows:

It is certainly rather difficult to give a general definition of 'respect for private life.' The concept of private life contained in Article 8 is however wider than the definition given by numerous Anglo-Saxon and French writers, according to which it is the right to live, as far as one wishes, protected from publicity; for the Commission, 'it comprises also to a certain degree the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality'. . . .

The state has . . . [in this case] not interfered with the applicant's behaviour and the relationships into which he has freely entered and which express and compose his personality.

But it has refused to recognise an essential element of his personality: his sexual identity resulting from his changed physical form, his psychical make-up and his social role. In doing so, it treats him as an ambiguous being, an 'appearance', disregarding in particular the effects of a lawful medical treatment aimed at bringing the physical sex and the psychical sex into accord with each other. As regards institutionalised society, despite all the formal concessions to the 'appearance' . . . it restricts the applicant to a sex which can now scarcely be considered his own. (para. 50, Report of the Commission.)

On the question of a violation of Article 12, the Commission noted that the applicant was not allowed to marry a woman under Belgian law even though he was able to have sexual intercourse with a woman. It then distinguished between the right to marry and the right to found a family, both of which are protected in Article 12. The two were quite separate and, on the facts of the present case, the former had been infringed:

Although marriage and the family are in fact associated in the Convention and in domestic legal systems, there is nothing to support the conclusion that the capacity to procreate is an essential condition of marriage or even that procreation is an essential purpose of marriage.

Apart from the fact that a family can always be founded by the adoption of children, it should be noted in this connection that although impotence is sometimes considered a ground of nullity, this is not generally the case as regards sterility.

The Commission is aware that transsexualism raises relatively new and complex questions to which states must find solutions compatible with the respect for fundamental rights. The Belgian Government pointed out that some of these questions arise particularly where the person affected by transsexualism has had children by a first marriage or where the 'conversion' cannot be considered as satisfactory.

Nevertheless, by raising in advance to any application to marry an indirect objection based merely on the statements in the birth certificate and the general theory of the rectification of civil status certificates without examining the matter more thoroughly, the government has in fact failed in the instant case to recognise the applicant's right to marry and found a family within the meaning of Article 12 of the Convention. (paras. 59-60.)

The questions raised on the merits were not considered by the Court in its judgment. Instead the Court held, by 13 votes to 4,<sup>1</sup> that it was unable to take

<sup>1</sup> Judges Evrigenis, Liesch, Gölcüklü and Matscher dissented.

cognisance of the case because the applicant had failed to exhaust local remedies. The Court agreed that there was no need for the applicant to have sought to change his first names under the 1974 law since this would not have provided a complete remedy. He should, however, have appealed further to the Court of Cassation in the proceedings that he brought for the rectification of his birth certificate and he should also have pleaded the European Convention in those proceedings. In the Court's opinion, it would not have been 'obviously futile', in the language of the *Finnish Ships* arbitration,<sup>1</sup> for the applicant to have appealed from the Court of Appeal to the Court of Cassation. Although the Court of Cassation could not question the Court of Appeal's findings of fact, the latter's judgment in the applicant's case was one of mixed law and fact, and the Court of Cassation could have ruled on the points of law involved. The Belgian judge—Judge Ganshof van der Meersch—joined the four dissenting judges on this point. He noted that the statements of law which the Court had relied upon as being ones that the Court of Cassation could have considered were statements made *obiter*. Such statements could not, in accordance with the Court of Cassation's established jurisprudence, be reviewed by it. But Judge Ganshof van der Meersch agreed with the Court that the applicant should have pleaded the Convention in the rectification proceedings, since the Convention was a part of Belgian law. It was not a good argument to say that the Convention was too generally worded in Article 8 to have been of much use (particularly when it was being relied upon at Strasbourg) or that it was open to the Belgian courts to invoke the Convention *ex officio*.

The case was the first in which the Court accepted an objection based upon non-exhaustion of local remedies. It was the second (see also the *Guzzardi* case, above) in which the Court took (at least in part) a different view from that of the national judge in the case in its assessment of the local remedies situation, this time to the disadvantage of the applicant. The case raises a relatively new issue of considerable importance. A judgment reflecting the opinion of the Commission would have required law reform in countries other than Belgium. English law, for example, does not permit a person in the applicant's position to obtain a corrected birth certificate or to marry.<sup>2</sup> Consideration by the Court of the Commission's wide reading of 'privacy' (so as to include the right to personality as well as the right to 'be left alone') would have been welcome.

### *Just compensation (Article 50)—compensation for costs*

*Case No. 5. The Sunday Times case.*<sup>3</sup> The Court held that the United Kingdom should pay the applicants £26,626.78 by way of costs and expenses incurred in bringing their claim.

In its judgment on the merits of the case in 1979, the Court reserved for later consideration the question of 'just compensation' under Article 50. The

<sup>1</sup> *United Nations Reports of International Arbitral Awards*, vol. 3, pp. 1479, 1503-4 (1934).

<sup>2</sup> A birth certificate, which is regarded as evidence of a factual situation existing at birth (and not an identity document), may be changed only in a case of error at birth: see Births and Deaths Registration Act 1953, s. 29 (3). Applications by persons who have changed their sex by surgery to have their birth certificates amended have been refused. On marriage, see *Corbett v. Corbett*, [1971] P. 83, and Matrimonial Causes Act 1973, s. 11.

<sup>3</sup> A. 6538/14. Decision as to admissibility: *Yearbook of the European Convention on Human Rights*, 18 (1975), p. 202. Report of the Commission adopted on 18 May 1977. E.C.H.R., Judgment of 26 April 1979 (Merits). Judgment of 6 November 1980 (Article 50). English text authentic. The case was heard by the plenary Court.



applicants now claimed costs in respect of the litigation in the English courts (£15,809.36) and the proceedings at Strasbourg (£24,760.53), with interest at 10 per cent. The applicants did not claim compensation for any 'moral damage' suffered by them. Although the Commission was of the opinion that compensation should be awarded under this head, the Court decided not to award any. In doing so, it followed its practice of looking only to 'items actually claimed' (para. 14, judgment).

The Court held against the applicants in respect of the costs of the English litigation. It did so because of an agreement between the parties to that litigation—Times Newspapers Ltd. and the Attorney-General—by which it was agreed before the outcome of the case in the House of Lords that each party should bear its own costs. The agreement was evidenced by a consent order by the House of Lords when delivering its judgment. In these circumstances, the Court was not prepared to award compensation by way of costs to the applicants (to be paid by the British Government) that would go against this agreement. The Court was prepared, however, to allow the applicants their costs in respect of the Strasbourg proceedings so far as these were 'actually incurred, were necessarily incurred and were also reasonable as to quantum' (para. 23). On this basis, the Court allowed most of the expenses claimed. The Court disallowed claims for some of the fees paid to the three counsel, for certain attendance expenses and for certain expert evidence. Altogether, the Court held, by 13 votes to 3,<sup>1</sup> that the United Kingdom should pay the applicants £22,626.78. The Court made no award in respect of interest.

The judgment illustrates once again how Article 50 has come to be used as a vehicle for the award of costs, as well as for compensation for the substantive breach of the Convention. The agreement as to costs necessarily prevented the award of the costs sustained in the English courts.

D. J. HARRIS

<sup>1</sup> Judges Sir Gerald Fitzmaurice, Liesch and Pinheiro Farinha dissented.

# DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES DURING 1979\*

## *Breach by a member State of its obligations—sanctions*

*Case No. 1. Commission v. France ('Mutton and lamb').*<sup>1</sup> France imposed surcharges and bans on imports of mutton and lamb from the United Kingdom. At that time there were no E.E.C. regulations establishing a common organization of the market in mutton and lamb. However, the Court of Justice of the European Communities had held in 1974 that the absence of a common organization of the market in an agricultural product could not justify failure to comply with the ordinary rules of the E.E.C. Treaty about free movement of goods.<sup>2</sup> The French surcharges and bans were therefore contrary to Articles 12 and 30 of the E.E.C. Treaty, unless the Act of Accession (laying down the terms on which the United Kingdom, Denmark and Ireland had joined the Community) had created an exception to the E.E.C. Treaty. France invoked Article 60 (2) of the Act of Accession, which provides:

In respect of products not covered, on the date of accession, by a common organization of the market, the provisions . . . concerning the progressive abolition of charges having equivalent effect to customs duties and of quantitative restrictions and measures having equivalent effect shall not apply to those charges, restrictions and measures if they form part of a national market organization on the date of accession.

This provision shall apply only to the extent necessary to ensure the maintenance of the national organization until the common organization of the market for these products is implemented.

Taken on its own, Article 60 (2) lent some support to France's position. But, while the Commission's case against France was pending before the Court of Justice of the European Communities, the Court held, in a similar case concerning a British ban on the import of cheap potatoes from the Netherlands, that Article 60 (2) must be read in conjunction with Article 9 of the Act of Accession, which provides:

1. In order to facilitate the adjustment of the new member States to the rules in force within the Communities, the application of the original Treaties and acts adopted by the institutions shall, as a transitional measure, be subject to the derogations provided for in this Act.

2. Subject to the dates, time limits and special provisions provided for in this Act, the application of the transitional measures shall terminate at the end of 1977.

Consequently, national measures which were authorized by Article 60 (2) had to terminate at the end of 1977 (or earlier, if a common organization of the relevant market was introduced before the end of 1977).<sup>3</sup>

\* © Dr. Michael Akehurst, 1981.

<sup>1</sup> [1979] E.C.R. 2729.

<sup>2</sup> *Charmasson v. Minister for Economic Affairs*, [1974] E.C.R. 1383.

<sup>3</sup> *Commission v. United Kingdom ('Potatoes')*, [1979] E.C.R. 1447.

The Commission's case against France, as originally drafted, challenged the maintenance of the French measures after the end of 1977. Following the Court's judgment in the potatoes case, the Commission sought to amend its pleadings during the oral procedure, so as to include also the period before the end of 1977; the Commission interpreted certain *obiter dicta* in the Court's judgment in the potatoes case as meaning that Article 60 (2) created rights only for the three new member States (until the end of 1977), but not at all for the six original member States. The Advocate General doubted whether that interpretation was correct.<sup>1</sup> The Court, however, refused to deal with this issue, on the grounds that 'a party may not alter the actual subject-matter of the dispute during the proceedings'.

The Court followed its judgment in the potatoes case by holding that Article 60 (2) ceased to have effect at the end of 1977, and therefore provided no defence for France's actions.

France pleaded that abolition of the French measures would cause 'serious social and economic effects on the economy of certain economically less-favoured areas for which sheep-rearing is an important source of wealth'. France also drew attention to the fact that negotiations were taking place on a proposal for E.E.C. regulations to establish a common organization of the market in mutton and lamb, and argued that any interval between the discontinuance of the French measures and their replacement by Community measures would cause pointless economic dislocation. The Court held that these considerations provided no legal defence for France's actions. This ruling reflects the Court's consistent view that the obligation of member States to comply with Community law is an absolute obligation; for instance, non-compliance cannot be excused by pleas that compliance would provoke strikes or other domestic difficulties.<sup>2</sup>

France also pleaded that 'inequality in the field of competition' would occur if France were required to abolish her own measures while the United Kingdom retained 'a national organization of the market based on the system of "deficiency payments"', which results in subsidizing exports of mutton and lamb to France'. The Court said:

If the French Republic is of the opinion that that [British] system contains features which are incompatible with Community law it has the opportunity to take action, either within the Council, or through the Commission, or finally by recourse to judicial remedies with a view to achieving the elimination of such incompatible features. A member State cannot under any circumstances unilaterally adopt, on its own authority, corrective measures or measures to protect trade designed to prevent any failure on the part of another member State to comply with the rules laid down by the Treaty.

This ruling restates the principle laid down in previous cases, that reprisals are forbidden by Community law.<sup>3</sup>

<sup>1</sup> [1979] E.C.R. 2729, 2746-8.

<sup>2</sup> *Commission v. United Kingdom* ('Tachographs'), [1979] E.C.R. 419, 428-9, 434-5.

<sup>3</sup> See, for instance, *Commission v. Luxembourg and Belgium*, [1964] E.C.R. 625, 631.

The fact that Community law prohibits reprisals does not necessarily justify the conclusion that Community law is not part of international law. In international law a treaty can prohibit reprisals (Article 60 (4) of the Vienna Convention on the Law of Treaties); the Geneva Conventions of 1949 on the laws of war are an example.

*Quaere* whether the prohibition of reprisals in Community law applies if a member State refuses to comply with a judgment of the Court of Justice of the European Communities. See Audretsch, *Supervision in European Community Law* (1978), pp. 81-2 and 183-4, and cf. Akehurst, 'Reprisals by Third States', this *Year Book*, 44 (1970), pp. 1, 6-14.



The Court therefore held that the French measures violated Articles 12 and 30 of the E.E.C. Treaty.

France refused to comply with the Court's judgment until the Council of Ministers adopted E.E.C. regulations setting up a common organization of the market in mutton and lamb. Delay in giving effect to the Court's judgments is not uncommon,<sup>1</sup> but France's deliberate defiance of the Court in this case (a defiance which lasted for a year) appears to be unique in the history of the European Communities.

The E.E.C. Treaty makes no express provision for sanctions against a member State which disobeys a judgment of the Court; the drafters of the Treaty seem to have relied on the good sense of the member States to obey judgments. It is true that the Commission can institute further proceedings against a State which disobeys a judgment, and a member State whose failure to obey the first judgment was caused by inefficiency may be prodded into compliance by the institution of further proceedings;<sup>2</sup> but further proceedings against a State which *deliberately* disobeys a judgment are unlikely to be effective, because a State which deliberately disobeys one judgment will probably disobey a second judgment.

Nevertheless, the British government urged the Commission to institute further proceedings against France, and criticized the Commission for not pursuing those further proceedings with sufficient vigour. It may be wondered why the British government did not bring its own proceedings against France under Article 170 of the E.E.C. Treaty. During the first twenty years of the existence of the E.E.C., the Commission brought forty actions against member States under Article 169 of the E.E.C. Treaty, but only one action was brought by one member State against another under Article 170.<sup>3</sup> Audretsch suggests that the reluctance of member States to use Article 170 can be explained by their confidence that the Commission will act vigorously under Article 169 and by their desire not to strain relations with another member State by taking it to Court.<sup>4</sup> Yet neither of these explanations holds true in the present case; the United Kingdom criticized the Commission for not acting with sufficient vigour, and relations between the United Kingdom and France were already so strained by the 'lamb war' that litigation between the United Kingdom and France could hardly have made them worse. The true explanation is probably that proceedings by the United Kingdom against France might have given the impression that France's actions affected only the interests of the United Kingdom, whereas the fact that proceedings were brought by the Commission against France enabled the United Kingdom to portray France's actions as a threat to the Community as a whole, thus giving the United Kingdom a considerable propaganda advantage in the eyes of other member States.

The dispute was eventually settled when France, the United Kingdom and the other member States agreed on the terms of an E.E.C. regulation setting up a common organization of the market in mutton and lamb.<sup>5</sup> When this common organization, financed from the E.E.C. budget, came into operation, the United Kingdom abandoned the British system of subsidizing exports through

<sup>1</sup> Audretsch, *op. cit.* (previous note), pp. 83-4 and 167-70.

<sup>2</sup> *Commission v. Italian Republic*, [1972] E.C.R. 529 (noted in this *Year Book*, 46 (1972-3), p. 449).

<sup>3</sup> Audretsch, *op. cit.* above (p. 344 n. 3), pp. 87, 119, 122.

<sup>4</sup> *Ibid.*, pp. 177-8.

<sup>5</sup> *Official Journal of the European Communities* (1980), nos. L 183 and L 275. The regulation came into force on 20 October 1980.

deficiency payments (to which France had objected) and France abandoned the French system of bans and surcharges on imports (to which the United Kingdom and the Court had objected).

*Fundamental rights—property—restrictions on use of land—general principles of law—First Protocol to the European Convention for the Protection of Human Rights, Article 1*

*Case No. 2. Hauer v. Land Rheinland-Pfalz.*<sup>1</sup> In 1975 the plaintiff applied to the competent administrative authority of the Land Rheinland-Pfalz for permission to plant vines on her land (where she had not previously grown vines). While her application was still pending, the Council of Ministers of the E.E.C. adopted Regulation 1162/76, which prohibited all new planting of vines, in order to reduce the over-production of wine in the E.E.C. On the basis of that Regulation, the authorities of the Land Rheinland-Pfalz rejected the plaintiff's application. She challenged that rejection before the Administrative Court of Neustadt, which referred certain questions concerning the interpretation of Regulation 1162/76 to the Court of Justice of the European Communities under Article 177 of the E.E.C. Treaty.

The first question was whether Regulation 1162/76 applied to applications which had been lodged (but not yet granted) at the time when the Regulation was adopted. The Court, relying both on a literal interpretation of the Regulation and on its purpose, held that the Regulation did apply to such applications. The Advocate General added that such an interpretation did not infringe the principles of respect for acquired rights or legitimate expectations; the mere lodging of an application was insufficient to create an acquired right or a legitimate expectation. Moreover, the principle of respect for legitimate expectations (*Vertrauensschutz*) did not apply 'if the possibility of legislative amendments is reasonably foreseeable',<sup>2</sup> and the possibility of a ban on the planting of new vines was clearly foreseeable in 1975—it had been mentioned as a possible future remedy for over-production in an earlier regulation adopted in 1970.

The Administrative Court (*Verwaltungsgericht*) of Neustadt hinted that, if the Court of Justice of the European Communities gave an extensive interpretation to Regulation 1162/76, that Regulation 'might have to be considered inapplicable in the Federal Republic of Germany owing to doubts existing with regard to its compatibility with the fundamental rights guaranteed by Articles 14 and 12 of the Grundgesetz<sup>3</sup> concerning, respectively, the right to property and the right freely to pursue trade and professional activities'.

The Court of Justice of the European Communities reacted by restating its previous case-law on fundamental rights.

As the Court declared in its judgment of 17 December 1970, *Internationale Handelsgesellschaft* [1970] E.C.R. 1125, the question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself. The introduction of special criteria for assessment stemming from the legislation

<sup>1</sup> [1979] E.C.R. 3727.

<sup>2</sup> *British Beef Co. v. Intervention Board for Agricultural Produce*, [1978] E.C.R. 1347, 1355, 1360-1. See also *Dietz v. Commission*, [1977] E.C.R. 2431, 2442-3; *Töpfer v. Commission*, [1978] E.C.R. 1019, 1033; *Koninklijke Scholten-Honig v. Hoofdproduktchap voor Akkerbouwprodukten*, [1978] E.C.R. 1991, 2004-5, 2016-17, 2032.

<sup>3</sup> i.e. the Basic Law (Constitution) of the Federal Republic of Germany.

or constitutional law of a *particular* member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the Common Market and the jeopardizing of the cohesion of the Community.

The Court also emphasized in the judgment cited, and later in the judgment of 14 May 1974, *Nold* [1974] E.C.R. 491, that fundamental rights form an integral part of the general principles of law, the observance of which it ensures; that in safeguarding those rights, the Court is bound to draw inspiration from constitutional traditions *common* to the member States, so that measures which are incompatible with the fundamental rights recognized by the Constitutions of those States are unacceptable in the Community; and that, similarly, international treaties for the protection of human rights on which the member States have collaborated or of which they are signatories<sup>1</sup> can supply guidelines which should be followed within the framework of Community law.<sup>2</sup>

After reaffirming its previous case-law, the Court said:

In these circumstances, the doubts evinced by the *Verwaltungsgericht* as to the compatibility of the provisions of Regulation No. 1162/76 with the rules concerning the protection of fundamental rights must be understood as questioning the validity of the regulation in the light of Community law. In this regard, it is necessary to distinguish between . . . a possible infringement of the right to property and . . . a possible limitation upon the freedom to pursue a trade or profession . . .

The right to property is guaranteed in the Community legal order in accordance with the ideas common to the Constitutions of the member States, which are also reflected in the First Protocol to the European Convention for the Protection of Human Rights. Article 1 of that Protocol provides as follows:

'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

'The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest . . .'

Since Regulation 1162/76 did not *deprive* the plaintiff of her land, the first paragraph of Article 1 of the First Protocol was not relevant.<sup>3</sup> On the other hand, Regulation 1162/76 clearly restricted the *use* of her land. Was it possible to regard such a restriction as 'necessary . . . in . . . the public interest', within the meaning of the second paragraph of Article 1 of the First Protocol? The Court said:

. . . it is necessary to consider also the indications provided by the constitutional rules and practices of the nine member States . . . [T]hose rules and practices permit the legislature to control the use of private property in accordance with the general interest. Thus some Constitutions refer to the obligations arising out of the ownership of property (German Grundgesetz, Article 14 (2), first sentence), to its social function (Italian Constitution, Article 42 (2)), to the subordination of its use to the requirements of the common good (German Grundgesetz, Article 14 (2), second sentence, and the Irish Constitution,

<sup>1</sup> *Nold v. Commission*, [1974] E.C.R. 491, 507. A more accurate translation of the German text of the judgment would read: ' . . . treaties . . . in the conclusion of which member States have participated or to which they have acceded'.

<sup>2</sup> [1979] E.C.R. 3744-5 (italics added).

<sup>3</sup> The Court did not therefore pronounce on the question whether the words 'No one shall be deprived of his possessions except . . . subject to the conditions provided for . . . by the general principles of international law' require a contracting party to pay compensation to its own nationals as well as to the nationals of other States. On this point, see the Opinion of the Advocate General, [1979] E.C.R. 3760-1.



Article 43. 2. 2), or of social justice (Irish Constitution, Article 43. 2. 1). In all the member States, numerous legislative measures have given concrete expression to that social function of the right of property. Thus in all the member States there is legislation on agriculture and forestry, the water supply, the protection of the environment and town and country planning, which impose restrictions, sometimes appreciable, on the use of real property.

More particularly, all the wine-producing countries of the Community have restrictive legislation . . . concerning the planting of vines . . . In none of the countries concerned are those provisions considered to be incompatible . . . with . . . the right to property.

Thus . . ., taking into account the constitutional precepts common to the member States and consistent legislative practices, in widely varying spheres, . . . the fact that Regulation No. 1162/76 imposed restrictions on the new planting of vines cannot be challenged in principle. It is a type of restriction which is known and accepted as lawful, in identical or similar forms, in the constitutional structure of all the member States.

However, . . . it is still necessary to examine whether the restrictions introduced by the provisions in dispute in fact correspond to objectives of general interest pursued by the Community, or whether, with regard to the aim pursued, they constitute a disproportionate and intolerable interference with the rights of the owner, impinging upon the very substance of the right to property . . .

At this point the Court invoked the principle of proportionality (*Verhältnismässigkeit*), a principle borrowed from German administrative law which the Court has frequently applied.<sup>1</sup> 'Proportionality' may have an unfamiliar ring to English lawyers, but it is similar to the principle of reasonableness applied in English administrative law. Indeed, the Court added that it must determine 'whether there exists a *reasonable* relationship between the measures provided for by the regulation and the aim pursued by the Community' (*italics added*).

After a detailed study of Regulation 1162/76 and of other measures taken to curb over-production of wine, the Court held that Regulation 1162/76 complied with the principle of proportionality; it was an essential part of the Council's comprehensive programme to curb over-production, and did 'not entail any undue limitation upon the exercise of the right to property'.

The plaintiff submitted that Regulation 1162/76 'infringes her fundamental rights in so far as its effect is to restrict her freedom to pursue her occupation as a wine-grower'. The Advocate General pointed out that the plaintiff remained free to produce wine on land where vineyards already existed; Regulation 1162/76 merely prohibited the creation of new vineyards.

The Court agreed, and said:

although it is true that guarantees are given by the constitutional law of several member States in respect of the freedom to pursue trade or professional activities, the right thereby guaranteed, far from constituting an unfettered prerogative, must . . . be viewed in the light of the social function of the activities protected thereunder. . . .<sup>2</sup> To the extent to which the prohibition on new plantings affects the free pursuit of the occupation of wine-growing, that limitation is no more than the consequence of the restriction upon the exercise of the right to property, so that the two restrictions merge. Thus the restriction upon the free pursuit of the occupation of wine-growing, assuming that it exists, is justified by the same reasons which justify the restriction placed upon the use of property.

Thus it is apparent from the foregoing that consideration of Regulation No. 1162/76, in the light of the doubts expressed by the Verwaltungsgericht, has disclosed no factor of

<sup>1</sup> This Year Book, 50 (1979), p. 280; *Atalanta v. Produktschap voor Vee en Vlees*, [1979] E.C.R. 2137.

<sup>2</sup> See also *Nold v. Commission*, [1974] E.C.R. 491, 508, and *Eridania v. Minister of Agriculture*, [1979] E.C.R. 2749, 2784.

such a kind as to affect the validity of that regulation on account of its being contrary to the requirements flowing from the protection of fundamental rights in the Community.

*Tortious liability for invalid regulations*

*Case No. 3. Ireks-Arkady G.m.b.H. v. Council and Commission.*<sup>1</sup> Until 1974 the E.E.C. paid production refunds (a form of subsidy) to manufacturers of quellmehl (a product derived from maize or wheat, used mainly in bread-making) and to manufacturers of other products such as maize starch which competed with quellmehl. In 1974 an E.E.C. regulation renewed the production refund for the competing products but did not renew it for quellmehl. In 1977 the Court held that this discrimination against manufacturers of quellmehl was unlawful and declared the regulation invalid.<sup>2</sup> The plaintiff in the present case was a member of a group of companies which manufactured quellmehl and sought damages for the loss suffered as a result of the abolition of the production refund for quellmehl.

The Court repeated the basic rules which it had laid down in earlier cases concerning liability for loss caused by E.E.C. regulations.

The finding that a legal situation resulting from the legislative measures of the Community is unlawful is not sufficient in itself to give rise to such liability.<sup>3</sup> . . . [T]he Community does not incur liability on account of a legislative measure which involves choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred.<sup>4</sup>

In particular, the Court reaffirmed its judgment in *Bayerische H.N.L. Vermehrungsbetriebe v. Council and Commission*,<sup>5</sup> in which it had held that, 'in the context of Community provisions in which one of the chief features was the exercise of a wide discretion essential for the implementation of the Common Agricultural Policy, the Community did not incur liability unless the institution concerned manifestly and gravely disregarded the limits on the exercise of its powers'.<sup>6</sup>

Applying these principles to the facts of the case, the Court held in favour of the plaintiff.

In the circumstances of this case, the Court is led to the conclusion that there was on the part of the Council such a grave and manifest disregard on the limits of the exercise of its discretionary powers in matters of the Common Agricultural Policy. In this regard the Court notes the following findings in particular.

In the first place it is necessary to take into consideration that the principle of equality, embodied in particular in the second subparagraph of Article 40 (3) of the E.E.C. Treaty,<sup>7</sup> which prohibits any discrimination in the common organization of the agricultural markets, occupies a particularly important place among the rules of Community law intended to protect the interests of the individual. Secondly, the disregard of that

<sup>1</sup> [1979] E.C.R. 2955.

<sup>2</sup> *Albert Ruckdeschel & Co. v. Hauptzollamt Hamburg-St. Annen*, [1977] E.C.R. 1753; this *Year Book*, 50 (1979), pp. 277, 279.

<sup>3</sup> Conversely, it seems that in very exceptional circumstances enactment of a *valid* regulation may give rise to tortious liability: this *Year Book*, 48 (1976-7), p. 400.

<sup>4</sup> Is the liability of the Community easier to establish if the measures did *not* involve choices of economic policy?

<sup>5</sup> [1978] E.C.R. 1209; this *Year Book*, 50 (1979), pp. 279-82.

<sup>6</sup> Is the liability of the Community easier to establish if the Community is exercising a *narrow* discretion or *non*-discretionary powers?

<sup>7</sup> For previous cases interpreting Article 40 (3), see this *Year Book*, 50 (1979), pp. 276-80.

principle in this case affected a limited and clearly defined group of commercial operators. It seems, in fact, that the number of quellmehl producers in the Community is very limited. Further, the damage alleged by the applicants goes beyond the bounds of the economic risks inherent in the activities in the sector concerned. Finally, equality of treatment with the producers of maize starch, which had been observed from the beginning of the common organization of the market in cereals, was ended by the Council in 1974 without sufficient justification.

For these reasons the Court arrives at the conclusion that the Community incurs liability for the abolition of the refunds for quellmehl under Regulation No. 1125/74 of the Council.

On the question of damages, the Court said:

The origin of the damage . . . lies in the abolition by the Council of the refunds which would have been paid to the quellmehl producers if equality of treatment with the producers of maize . . . starch had been observed. Hence, the amount of those refunds must provide a yardstick for the assessment of the damage suffered.<sup>1</sup>

However, since the evidence conflicted concerning the amount of quellmehl which the plaintiff had produced during the period in dispute, the Court contented itself with laying down the criteria for compensation, leaving the exact 'amount of the compensation to be determined either by agreement between the parties or by the Court [in a later judgment] in the absence of such agreement'.

Further clarification of the circumstances in which the Community is liable (or, more frequently, not liable) for loss caused by an invalid regulation was provided in a case decided by the Court two months after the *Ireks-Arkady* case. *Koninklijke*

<sup>1</sup> The Council and the Commission pleaded that the plaintiffs could and should have mitigated their losses by passing on their increased production costs to their customers in the form of higher prices. The plaintiffs replied that they would have lost their customers if they had increased their selling prices. The Court held that the defendants had not proved that it was commercially possible for the plaintiffs to mitigate their losses by increasing their selling prices, but suggested that damages would be reduced in cases where it was possible for a plaintiff to mitigate his loss by increasing his selling prices: [1979] E.C.R. 2974, 3004-7.

In a similar case, some of the plaintiffs claimed *additional* damages on the grounds that the abolition of the production refund had forced them to close their factories and commence insolvency proceedings. The Court held that, even if the factory closures and insolvency were the result of the abolition of the production refund (which was by no means proved), 'those difficulties would not be a sufficiently direct consequence of the unlawful conduct of the Council to render the Community liable to make good the damage. In the field of non-contractual liability of public authorities for legislative measures, the principles common to the laws of the member States . . . cannot be relied on to deduce an obligation to make good every harmful consequence, even a remote one, of unlawful legislation' (*Dumortier Frères v. Council*, [1979] E.C.R. 3091, 3117, and cf. the Opinion of the Advocate General, *ibid.*, pp. 3007-10).

The limitation of liability in the *Dumortier Frères* case may appear rather sweeping, especially since English courts have abandoned *directness* as the test of remoteness of damage (*Winfield and Jolowicz on Tort*, 11th edn. by W. V. H. Rogers (1979), pp. 116-32). But it is submitted that it can be justified in the following way. The plaintiff should try to mitigate his loss; if he cannot do so by increasing his selling prices, he should sell his products at a loss and then recoup that loss by claiming damages from the Community. A plaintiff with adequate financial resources would be able to bear the expense of selling his products at a loss while his claim for damages was pending. Some of the plaintiffs in the *Dumortier Frères* case were unable to bear that expense because they did not have adequate financial resources, and therefore had to close their factories and start insolvency proceedings. In other words, their loss was aggravated because of their poverty, and the defendants were not liable for the consequences of the plaintiffs' pre-existing poverty. If this explanation of the *Dumortier Frères* case is correct, the rule in Community law is the same as the rule in English law: *Liesbosch v. Edison*, [1933] A.C. 449, as interpreted in *Martindale v. Duncan*, [1973] 1 W.L.R. 574 (contra, *Clippens Oil Co. v. Edinburgh and District Water Trustees*, [1907] A.C. 291, 303, *per* Lord Collins, *obiter*).



*Scholten-Honig N.V. v. Council and Commission*<sup>1</sup> arose out of the imposition, by Regulation 1111/77, of a levy (tax) on the production of isoglucose, an artificial liquid sweetener which competes with sugar. The Community had a surplus of sugar, and sugar producers had to pay a production levy to finance disposal of the surplus. Since isoglucose was a substitute for sugar and sales of isoglucose within the Community aggravated the sugar surplus, the Council of Ministers of the European Communities decided that isoglucose producers should contribute to the cost of disposing of the sugar surplus by paying a levy similar to the levy paid by sugar producers. But isoglucose producers had to pay the levy on all their production, while sugar producers had to pay it on less than 26 per cent of their production; isoglucose producers were thus treated more harshly than sugar producers, even though the maximum rate of the isoglucose levy was just over half the rate of the sugar levy. In a preliminary ruling under Article 177 of the E.E.C. Treaty, handed down on 25 October 1978, the Court of Justice of the European Communities held that Regulation 1111/77 was invalid because it discriminated unlawfully against producers of isoglucose.<sup>2</sup>

Following that ruling, the Council of Ministers arranged for the sums previously collected under the production levy to be repaid to the isoglucose manufacturers. Koninklijke Scholten-Honig claimed that these payments were insufficient to cover the losses which it had suffered as a result of Regulation 1111/77; Regulation 1111/77 had made the production of isoglucose so uneconomic that the plaintiff had been forced to stop manufacturing isoglucose permanently. It had therefore lost the money which it had spent on research and development costs, and on equipping factories to produce isoglucose.

The Court could probably have rejected the plaintiff's claim for compensation for these losses on the grounds that they were too remote.<sup>3</sup> Instead, the Court held that Regulation 1111/77, although invalid, did not give rise to any tortious liability, because it had not involved a sufficiently manifest and grave disregard of the limits on the Council's discretion.

In the context of Community legislation in which one of the main features is the exercise of a wide discretion essential for the implementation of the Common Agricultural Policy, the liability of the Community can arise only *exceptionally* in cases in which the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers.

This is confirmed in particular by the fact that, even though an action for damages under Articles 178 and 215 of the [E.E.C.] Treaty constitutes an independent action, it must nevertheless be assessed having regard to the whole of the system of legal protection of individuals set up by the Treaty. If an individual takes the view that he is injured by a Community legislative measure which he regards as illegal he has the opportunity, when the implementation of that measure is entrusted to national authorities, to contest the validity of the measure, at the time of its implementation, before a national court in an action against the national authority. Such a court may, or even must, in pursuance of Article 177, refer to the Court of Justice a question on the validity of the Community measure in question. The existence of such an action is by itself of such a nature to ensure the efficient protection of the individuals concerned.

These considerations are of importance where, as in these cases, the Court, within

<sup>1</sup> [1979] E.C.R. 3583.

<sup>2</sup> *Royal Scholten-Honig (Holdings) Ltd. v. Intervention Board for Agricultural Produce*, [1978] E.C.R. 2037; this *Year Book*, 50 (1979), pp. 276-9.

<sup>3</sup> See above, p. 350, n. 1.

the framework of a reference for a preliminary ruling, has declared a production levy to be illegal and where the competent institution, following that finding, has abolished the levy . . . *with retroactive effect*.

It is appropriate to inquire in the light of these considerations whether, in the circumstances of these cases, there has been, on the part of the Council and the Commission, a grave and manifest disregard of the limits which they are required to observe in exercising their discretion within the framework of the Common Agricultural Policy.

In this respect it must be recalled that the Court did not declare invalid any isoglucose production levy but only the method of calculation adopted and the fact that the levy applied to the whole of the isoglucose production. Having regard to the fact that the production of isoglucose was playing a part in increasing sugar surpluses it was permissible for the Council to impose restrictive measures on such production.

Although, in its judgment of 25 October 1978, giving a preliminary ruling within the framework of a consideration of the validity of Regulation No. 1111/77, the Court found that the charges borne in pursuance of that regulation by isoglucose producers by way of production levy were manifestly unequal as compared with those imposed on sugar producers, it does not follow that, for the purposes of an assessment of the illegality of the measure in connexion with Article 215 of the Treaty, the Council has manifestly and gravely disregarded the limits on the exercise of its discretion.

In fact, even though the fixing of the isoglucose production levy at five units of account per 100 kg of dry matter was vitiated by errors, it must nevertheless be pointed out that, having regard to the fact that an appropriate levy was fully justified, these were not errors of such gravity that it may be said that the conduct of the defendant institutions in this respect was *verging on the arbitrary*<sup>1</sup> and was thus of such a kind as to involve the Community in non-contractual liability.<sup>2</sup>

The distinction between this case and the *Ireks-Arkady* case is narrow and not entirely clear. It is unlikely that the difference between the cases lies in the difference between production refunds and production levies; if there had been a production levy on isoglucose and *no* production levy on sugar, the Community would probably have been liable in damages. Fixing the production levy on isoglucose at a *rate* which was in effect higher than the rate effectively paid by sugar producers was insufficient to give rise to tortious liability. What the judgment does not make clear is whether such discrimination concerning the rate of production levies (or, presumably, concerning the rate of production refunds) can *never* give rise to tortious liability, or whether (as the Advocate General suggested<sup>3</sup>) there were extenuating circumstances, peculiar to the relationship between sugar and isoglucose, which enabled the Community to escape tortious liability in this case.

The conclusion to be drawn from the relevant cases is that the Community is liable for loss caused by an invalid regulation only in exceptional circumstances. The plaintiff's case must satisfy *all* of the following requirements:

(1) The enactment of the regulation must constitute a violation of a superior rule of law (which presumably means that the rule is higher than the regulation in the hierarchy of the sources of Community law).<sup>4</sup>

<sup>1</sup> The Advocate General defined a decision verging on the arbitrary as 'a decision which is totally unsupported by objective considerations or in which such considerations have had no influence': [1979] E.C.R. 3577.

<sup>2</sup> *Ibid.*, pp. 3626-7 (*italics added*).

<sup>3</sup> *Ibid.*, pp. 3577-80.

<sup>4</sup> In *Bayerische H.N.L. Vermehrungsbetriebe G.m.b.H. v. Council and Commission*, [1978] E.C.R. 1209, 1232, Mr. Advocate General Capotorti adopted an even more restrictive approach,

(2) The superior rule of law must be designed for the protection of the individual (thus excluding, for example, rules about voting procedure in the Council of Ministers, which are designed to protect member States, not individuals).

(3) The violation of that rule must be sufficiently serious, i.e. 'the institution concerned [must have] manifestly and gravely disregarded the limits on the exercise of its powers' and must have acted in a manner 'verging on the arbitrary'.

(4) The plaintiff must prove that he has suffered serious loss, loss which 'goes beyond the bounds of the economic risks inherent in the activities in the sector concerned'.<sup>1</sup>

(5) The plaintiff must prove a direct causal link between the violation of the superior rule of law and the loss which he has suffered.<sup>2</sup>

MICHAEL AKEHURST

arguing that the rule must be not only higher than the regulation in the hierarchy of the sources of Community law, but *also* 'a rule which is of fundamental importance in the Community legal order'. This approach may be reflected in the Court's judgments in that case and in the *Ireks-Arkady* case, which emphasized the importance of Article 40 (3), instead of merely pointing out that Treaty provisions were automatically superior to regulations. But it is submitted that the introduction of a distinction between important superior rules and unimportant superior rules is too restrictive and creates unnecessary vagueness and uncertainty.

<sup>1</sup> *Ireks-Arkady G.m.b.H. v. Council and Commission*, [1979] E.C.R. 2955, 2973. The Court in that case also emphasized that the regulation in dispute had 'affected a limited and clearly defined group of commercial operators'; 'the number of quellmehl producers in the Community is very limited'. It is not clear whether the Court intended to lay down a legal requirement that the number of potential plaintiffs *must* be small, and, if so, whether that requirement is an *alternative* to the requirement that the plaintiff must have suffered serious losses or whether *both* requirements need to be satisfied. See also *Bayerische H.N.L. Vermehrungsbetriebe G.m.b.H. v. Council and Commission*, [1978] E.C.R. 1209, 1225 (this *Year Book*, 50 (1979), pp. 279-82), where the Court dismissed a claim for compensation for loss caused by a regulation requiring all purchasers of animal feeding-stuffs to buy skimmed-milk powder at a high price; the Court said:

'... this measure affected very wide categories of traders, in other words all buyers of compound feeding-stuffs containing protein, so that its effects on individual undertakings were considerably lessened. Moreover, the effects of the regulation on the price of feeding-stuffs as a factor in the production costs of those buyers were only limited since that price rose by little more than 2%. This price increase was particularly small in comparison with the price increases resulting, during the period of application of the regulation, from the variations in the world market prices of feeding-stuffs containing protein, which were three or four times higher than the increase resulting from the obligation to purchase skimmed-milk powder introduced by the regulation. The effects of the regulation on the profit-earning capacity of the undertakings did not ultimately exceed the bounds of the economic risks inherent in the activities of the agricultural sectors concerned.'

<sup>2</sup> *Pool v. Council*, [1980] 3 C.M.L.R. 279, 293-5. See also above, p. 350, n. 1, and *Comptoir National Technique Agricole v. Commission*, [1976] E.C.R. 797.





# UNITED KINGDOM MATERIALS ON INTERNATIONAL LAW 1980

*Edited by* GEOFFREY MARSTON<sup>1</sup>

## INDEX<sup>2</sup>

<i>Part One: International Law in general</i>	<i>Page</i>
I. Nature, basis, purpose	
II. Relationship between international law and municipal law	
A. In general	362
B. International law in municipal courts	362
C. Municipal remedies for violations of international law	362
 <i>Part Two: Sources of International Law</i>	
I. Treaties	363
II. Custom	
III. General principles of law	
IV. Judicial decisions	
V. Opinions of writers	
VI. Equity	
VII. Unilateral acts	
VIII. Restatement by formal processes of codification and progressive development	364
IX. Comity	
X. Acquisition and loss of rights	
 <i>Part Three: Subjects of International Law</i>	
I. States	
A. International status	
1. Sovereignty and independence	364
2. Non-intervention	365
3. Domestic jurisdiction	
4. Equality of States	366
5. Immunity (see Part Five: VIII. B)	
B. Recognition (see also Part Fourteen: II. B)	
1. Recognition of States	366
2. Recognition of governments	367
3. Forms of recognition	
4. Retroactive effect of recognition	
5. Non-recognition	368

<sup>1</sup> LL.M., Ph.D., (Lond.); Lecturer in Law, University of Cambridge; Fellow of Sidney Sussex College. The assistance of Mr. A. D. Watts, Legal Counsellor, Foreign and Commonwealth Office, is gratefully acknowledged.

<sup>2</sup> Based on the *Model Plan for the Classification of Documents concerning State Practice in the field of Public International Law* adopted by the Committee of Ministers of the Council of Europe in Resolution (68) 17 of 28 June 1968.

C. Types of States	<i>Page</i>
1. Unitary States, Federal States and Confederations	
2. Personal Unions, Real Unions	
3. Permanently neutral States	
4. Dependent States	370
D. Formation, continuity and succession of States	
1. Formation	373
2. Identity, continuity and succession	373
3. Effect of territorial change	
4. Effect of extinction	
E. Self-determination	375
II. International organizations	
A. In general	
1. Legal status	
(a) Personality	
(b) Powers, including treaty-making power	
(c) Privileges and immunities	376
2. Participation of States in international organizations	
(a) Admission	
(b) Suspension, withdrawal and expulsion	383
(c) Obligations of membership	
(d) Representation	383
3. Legal effect of acts of international organizations	384
4. International officials	
5. Responsibility of international organizations (see Part Eleven: II. B)	
B. Particular types of organizations	
1. Universal organizations	387
2. Regional organizations	
3. Organizations constituting integrated communities	388
4. Other types of organizations	
III. Other subjects of international law	
A. Insurgents	
B. Belligerents	
C. The Holy See	394
D. Mandated and trust territories, Namibia	394
E. Condominium	395
F. Miscellaneous (e.g. chartered companies, tribes)	398

*Part Four: The Individual (including the Corporation) in International Law*

I. Nationality	398
----------------	-----



II.	Diplomatic protection (see Part Eleven: II. A. 7. (a))	<i>Page</i>
III.	Aliens or non-nationals	
IV.	Minorities	
V.	Statelessness, refugees	401
VI.	Immigration and emigration, extradition, expulsion and asylum	402
VII.	Protection of human rights and fundamental freedoms	403
VIII.	Responsibility of the individual (see Part Eleven: II. D)	

*Part Five: Organs of the State*

I.	The Head of the State	
II.	Ministers	
III.	Departments of the State	
IV.	Diplomatic agents and missions	407
V.	Consular agents and consulates	416
VI.	Special missions	
VII.	Armed forces	417
VIII.	Immunity of organs of the State	
	A. Diplomatic and consular immunity	418
	B. Immunity other than diplomatic	422

*Part Six: Treaties*

I.	Conclusion and entry into force	
	A. Conclusion	
	B. Reservations to multilateral treaties	
	C. Entry into force	436
II.	Observance, application and interpretation	
	A. Observance	438
	B. Application	
	C. Interpretation	
	D. Treaties and Third States	438
III.	Amendment and modification	
IV.	Invalidity, termination and suspension of operation	
	A. General rules	
	B. Invalidity	
	C. Termination, suspension of operation	
	D. Procedure	
	E. Consequences of invalidity, termination or suspension of operation	
V.	Depositaries, notification, corrections and registration	

<i>Part Seven: Personal Jurisdiction</i>		<i>Page</i>
I.	General concept	
II.	Exercise	
	A. Consular jurisdiction, capitulations, mixed courts	
	B. Military jurisdiction	439
	C. Miscellaneous (e.g. Antarctica, artificial islands, <i>terra nullius</i> )	
<i>Part Eight: State Territory and Territorial Jurisdiction</i>		
I.	Parts of territory, delimitation	
	A. Frontiers	
	B. <i>Voisinage</i>	
	C. Sub-soil	
	D. Territorial sea (see Part Nine: I)	
	E. Internal waters (see Part Nine: III)	
	F. Air space (see Part Ten: I)	
II.	Territorial jurisdiction	
	A. Territorial sovereignty	440
	B. Limitations upon territorial jurisdiction	
	C. Concurrent territorial jurisdiction	443
	D. Extra-territoriality	444
III.	Acquisition and transfer of territory	
	A. Acquisition	
	B. Transfer	
IV.	Regime under the Antarctic Treaty	450
<i>Part Nine: Seas, Waterways</i>		
I.	Territorial Sea	
	A. Delimitation	451
	B. Legal status	
	1. Right of innocent passage	451
	2. Regime of merchant ships	
	3. Regime of public ships other than warships	
	4. Warships	451
	5. Bed and subsoil	
II.	Contiguous zone	
III.	Internal waters	452
IV.	Straits	453
V.	Archipelagic waters	

VI. Canals	
VII. The high seas	
A. Freedom of the high seas	
1. Navigation	453
2. Fishery	
3. Submarine cables and pipelines	
4. Right of overflight	
5. Other freedoms	
B. Nationality of ships	453
C. Hot pursuit	454
D. Visit and search	
E. Piracy	
F. Conservation of living resources	
G. Pollution	454
H. Jurisdiction over ships	454
VIII. Continental shelf	456
IX. Exclusive fishery zone	458
X. Exclusive economic zone	461
XI. Rivers	462
XII. Bed of the sea beyond national jurisdiction	462
XIII. Access to sea and its resources for land-locked and geographically disadvantaged States	

*Part Ten: Air Space, Outer Space*

I. Sovereignty over air space	
A. Extent	463
B. Limitations	464
II. Air Navigation	
A. Civil aviation	
1. Legal status of aircraft	464
2. Treaty regime	465
B. Military aviation	
III. Outer space	466
IV. Telecommunications	

*Part Eleven: Responsibility*

I. General concept	
II. Responsible entities	



A. States	<i>Page</i>
1. Elements of responsibility	466
2. Executive acts	
3. Legislative acts	
4. Judicial acts	
5. Matters excluding responsibility	
6. Reparation	466
7. Procedure	468
(a) Diplomatic protection	
(i) Nationality of claims	468
(ii) Exhaustion of local remedies	
(b) Peaceful settlement (see Part Twelve)	
B. International organizations	
C. Other subjects of international law	
D. Individuals, including corporations	

*Part Twelve: Pacific Settlement of Disputes*

I. The concept of an international dispute	
II. Modes of settlement	
A. Negotiation	
B. Consultation	
C. Enquiry and finding of facts	
D. Good offices	
E. Mediation	
F. Conciliation	469
G. Arbitration	
1. Arbitral tribunals and commissions	469
2. The Permanent Court of Arbitration	
H. Judicial settlement	
1. The International Court of Justice	469
2. Other tribunals	
I. Settlement within international organizations	
J. Other means of settlement	

*Part Thirteen: Coercion and use of force short of war*

I. Unilateral acts	471
A. Retorsion	
B. Reprisals	
C. Pacific blockade	
D. Intervention (see also Part Three: I. A. 2)	472
E. Other unilateral acts	
II. Collective measures	
A. Regime of the United Nations	475

## B. Other collective measures

477

*Part Fourteen: Armed Conflicts*

## I. International war

## A. Resort to war

1. Definition of war
2. Limitation and abolition of the right of war
3. Limitation and reduction of armaments

479

## B. The laws of war

1. Sources and sanctions
2. Commencement of war and its effects
3. Land warfare
4. Sea warfare
5. Air warfare
6. Distinction between combatants and non-combatants
7. Humanitarian law
8. Belligerent occupation
9. Conventional weapons
10. Nuclear, bacteriological and chemical weapons
11. Treaty relations between combatants
12. Termination of war, treaties of peace

479

482

## II. Civil war

## A. Rights and duties of States

## B. Recognition of insurgency and belligerency

## III. Other armed conflicts

*Part Fifteen: Neutrality, non-belligerency*

## I. Legal nature of neutrality

## A. Land warfare

483

## B. Sea warfare

## C. Air warfare

## II. Neutrality in the light of the United Nations Charter

## III. Neutrality as State policy

484

## IV. Non-belligerency

*Appendices*

## I. Multilateral Agreements signed by the United Kingdom in 1980

485

## II. Bilateral Agreements concluded by the United Kingdom in 1980

489

## III. United Kingdom Legislation during 1980 concerning matters of International Law

496

*Abbreviations*

H.C. Debs.	<i>Hansard</i> , House of Commons Debates (5th series)
H.L. Debs.	<i>Hansard</i> , House of Lords Debates
Cmd.	Command Paper (4th series)
Cmnd.	Command Paper (5th series)
UKMIL	<i>United Kingdom Materials on International Law</i>

**Part One: II. A.** *International law in general—relationship between international law and municipal law*

(See also Part Three: II. A. 3., *infra*.)

In reply to the question whether the Treaty of Rome prevents Parliament from enacting a provision that no agreement entered into by Her Majesty's Government would have legislative force in the United Kingdom until it had been approved by Parliament, the Prime Minister wrote:

The Treaty of Rome would not prevent Parliament from enacting such a provision in respect of agreements which member States alone may sign. This provision could, however, not apply to other agreements signed by one of the Communities (and not by Her Majesty's Government), which bind member States under Article 228(2) of the Treaty of Rome. The application to 'mixed' agreements, which may be signed both by a Community and by member States is less clear, but United Kingdom ratification and the ability of a Community to participate might be affected. (H.C. Debs., vol. 979, Written Answers, col. 116: 19 February 1980.)

**Part One: II. B.** *International law in general—relationship between international law and municipal law—international law in municipal courts*

In reply to a member of the public who had inquired whether in light of Lord Fraser's speech in *Fothergill v. Monarch Airlines Ltd.*, [1980] 3 W.L.R. 209, 230, a statute to implement the Vienna Convention on the Law of Treaties was contemplated, the Legal Adviser to the Foreign and Commonwealth Office, Sir Ian Sinclair, wrote on 3 September 1980 in part:

I do not . . . think that there is any question of enacting the Vienna Convention on the Law of Treaties in the form of a statute, since the view taken by the majority of their Lordships in the case . . . confirms that in any event, as a matter of common law, the courts will be prepared to make cautious reference to the *travaux préparatoires* of an international convention in construing that Convention. (Text provided by the Foreign and Commonwealth Office.)

**Part One: II. C.** *International law in general—relationship between international law and municipal law—municipal remedies for violations of international law*

(See Part Eight: II. D., *infra*.)



**Part Two: I. Sources of international law—treaties**

In reply to a request to list all the treaties and agreements of any kind between the United Kingdom and Poland which are still in effect, the Minister of State, Foreign and Commonwealth Office, wrote:

The following is a list of treaties and other agreements concluded between the Governments of the United Kingdom and Poland. This list does not imply any judgment by Her Majesty's Government on whether the treaties or agreements concluded before 1945 are still in effect.

<i>Place and date of signature</i>	<i>Title</i>
Warsaw, 26 November 1923	Treaty of Commerce and Navigation
Warsaw, 26 August 1931	Convention regarding Legal Proceedings in Civil and Commercial Matters
Warsaw, 11 January 1932	Extradition Treaty
Warsaw, 26 October 1933	Agreement relating to Commercial Travellers
Warsaw, 16 April 1934	Convention relating to the Tonnage Measurement of Merchant Ships
London, 25 August 1939	Agreement regarding Mutual Assistance
London, 24 June 1946	Agreement for the Settlement of Outstanding Financial Questions
Warsaw, 24 January 1948	Exchange of Notes concerning Compensation for British Interests affected by the Polish Nationalisation Law of 3 January 1946
Warsaw, 11 November 1954	Agreement regarding the Settlement of Financial Matters, with Exchanges of Notes
London, 23 May 1960	Exchange of Notes modifying the Agreement for the Settlement of Outstanding Financial Questions signed on 24 June 1946
Warsaw, 2 July 1960	Agreement concerning Civil Air Transport
Warsaw, 12 December 1979/ 30 January 1980	Exchange of Notes amending the Schedule to the Agreement concerning Civil Air Transport of 2 July 1960
Warsaw, 26 September 1964	Exchange of Notes regarding the Rights to be Accorded to Polish Vessels within the British Fishery Limits to be established on 30 September 1964
London, 23 February 1967	Consular Convention
London, 16 December 1976	Protocol amending the Consular Convention signed at London on 23 February 1967
Warsaw, 21 July 1967	Health Services Convention
London, 20 March 1973	Long Term Agreement on the Development of Economic, Industrial, Scientific and Technical Co-operation
London, 26 September 1975	Agreement on International Road Transport
London, 30 March 1976	Exchange of Notes concerning the Settlement of certain Residual Matters arising from the termination of the Agreement of 14 January 1949 relating to Money and Property subjected to Special Measures since 1 September 1939

- London, 16 December 1976    Five Year Agreement on Economic Co-operation  
 London, 16 December 1976    Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains  
 London, 7 November 1978    Convention on Co-operation in the Field of Culture, Education and Science  
 (H.C. Debs., vol. 996, Written Answers, cols. 177–8: 16 December 1980.)

**Part Two: VIII.** *Sources of international law—restatement by formal processes of codification and progressive development*

In the course of a debate on 5 December 1980 in the Sixth Committee of the General Assembly of the United Nations, the representative of the United Kingdom, Mr. D. H. Anderson, made the following observation:

... his delegation did not agree with the proposition ... that there was an 'urgent need' for progressive development of international economic law. That view had been borne out by the lack of response to the request for comments on General Assembly resolution 34/150. His delegation considered that negotiations on economic subjects should be conducted in political and economic bodies, not the Sixth Committee, and he pointed out that various negotiations relating to a new system of international economic relations had been held, were in progress or were planned in numerous other forums. Efforts aimed at the consolidation, codification or progressive development of economic law seemed particularly inopportune in view of the numerous rounds of negotiations in progress and the prospect of global negotiations. (A/C.6/35/SR. 75, p. 15.)

In the course of a debate in the House of Lords on the subject of Britain's role in the United Nations, the Government Minister, Lord Trefgarne, stated:

Another key role of the United Nations is its contribution towards the development of international law. In addition to other considerations, our position as the source of one of the main legal traditions of the world makes it appropriate that we should play a leading role in this sphere. Among the major achievements of recent years have been the codification under UN auspices of the Law of Treaties and the law relating to diplomatic and consular relations. I hope we shall soon witness another: a comprehensive review of the earlier codification of the international law of the sea, together with a new international régime for the deep seabed ... (H.L. Debs., vol. 415, col. 1169: 17 December 1980.)

**Part Three: I. A. 1.** *Subjects of international law—States—international status—sovereignty and independence*

(See also Part Three: I. A. 2., *infra*.)

In a diplomatic note dated 11 July 1980, addressed to the Chairman of the Ad Hoc Committee on the Indian Ocean, the Permanent Mission of the United Kingdom to the United Nations made the following observations on the proposal to declare the Indian Ocean a zone of peace:

... the Government of the United Kingdom judge it right to record their view that

vague, general exhortations and declarations serve little useful purpose in matters of arms control and disarmament. The scope of application of any agreement must be precisely defined so that no ambiguity exists over the rights and responsibilities of Parties. The provisions must be of such a nature that non-compliance can be detected with certainty without cutting across International Law, or derogation from sovereign rights of Parties. (Text provided by the Foreign and Commonwealth Office.)

In the course of its deliberations on the role of the United Kingdom Parliament in relation to the British North America Acts, the Foreign Affairs Committee of the House of Commons examined Mr. J. R. Freeland, Second Legal Adviser, Foreign and Commonwealth Office. During his evidence on 12 November 1980, Mr. Freeland stated:

I do not think that there is any dispute that in the eyes of international law Canada and the United Kingdom are equally independent sovereign States . . . (*Parliamentary Papers*, 1979–80, House of Commons, Paper 362–xxi, p. 70.)

In the course of a debate on United Kingdom–Canadian relations, the Lord Privy Seal, Sir Ian Gilmour, stated:

I do not think that for many years Canada can be said to have had colonial status. The subject that we are discussing is anomalous in that respect. For many years, Canada has been a fully sovereign independent country. She is a founder member of the League of Nations. Even any theoretical elements, as opposed to real elements, of colonial status were swept away by the Statute of Westminster in 1931. Long before that Canada was a fully-fledged sovereign Power.

. . . At the present time neither the Parliament of Canada nor the legislatures of Canada's provinces can pass laws repealing, amending or altering the central provisions of the British North America Act 1867. To do so still requires an Act of the United Kingdom Parliament. That is what my hon. Friend meant by 'colonial status'. However, by constitutional convention, and by reason of Canada's sovereign status, the British Parliament cannot act to amend the Canadian constitution except when requested to do so by the Canadian authorities normally in a joint address to the Queen by both Canadian Houses of Parliament—but it is bound to act in accordance with a proper request from the Canadian authorities and cannot refuse to do so. (H.C. Debs., vol. 996, cols. 1048–9: 19 December 1980.)

**Part Three: I. A. 2. *Subjects of international law—States—international status—non-intervention***

(See also Part Four: VII. (statement by Lord Trefgarne of 17 December 1980), *infra*.)

The European Council, which includes the United Kingdom, at its meeting in Venice on 12 and 13 June 1980, made the following declaration on the subject of the Lebanon:

The Nine affirm once again their full and complete solidarity with the friendly country of the Lebanon whose stability remains dangerously threatened by confrontations in the region, and renew their urgent appeal to all the countries



or parties concerned to put an end to all acts liable to damage the independence, sovereignty and territorial integrity of Lebanon or the authority of its Government. The Nine will support any action or initiative which could ensure the return of peace and stability of the Lebanon, which constitutes an essential stabilising factor in the region. (H.L. Debs., vol. 410, col. 844: 16 June 1980; H.C. Debs., vol. 986, col. 1146: 16 June 1980.)

In the course of a debate on the subject of the death penalty imposed on a politician in South Korea, the Lord Privy Seal, Sir Ian Gilmour, stated:

... South Korea is a sovereign State. This is an internal matter for the Korean Government. (H.C. Debs., vol. 991, col. 960: 3 November 1980.)

**Part Three: I. A. 4. *Subjects of international law—States—international status—equality of States***

(See also Part Thirteen: I. (statements of 29 October and 6 November 1980) and Thirteen: I. D. (statement of 2 July 1980), *infra*.)

In reply to the question what was the Government's view of the so-called 'Brezhnev doctrine' of the limited sovereignty of Socialist States in Eastern Europe, the Minister of State, Foreign and Commonwealth Office, wrote:

This concept of 'limited sovereignty' is inconsistent with the sovereign equality of States in international law, which is a basic principle of the United Nations Charter. It implies a claim to a right of intervention by one or more Communist States in the affairs of another sovereign and independent State which is contrary to international law and to the CSCE Final Act. (H.C. Debs., vol. 996, Written Answers, col. 14: 15 December 1980.)

**Part Three: I. B. 1. *Subjects of international law—States—recognition—recognition of States***

In reply to a question, the Lord Privy Seal wrote:

The United Kingdom has accorded full diplomatic recognition to the Holy See for many years. (H.C. Debs., vol. 977, Written Answers, col. 427: 25 January 1980.)

In the course of a debate in the House of Lords on the subject of peace negotiations in the Middle East, the Lord Chancellor, Lord Hailsham, stated:

... the United Nations Organisation, not only by Resolution 242 but by the recognition of the state of Israel, recognises its right to exist, and no lasting peace could possibly be attained in the Middle East which was worth having for the civilised world which did not continue to acknowledge this right, which is indissoluble for any member of the United Nations Organisation. (H.L. Debs., vol. 412, col. 1047: 31 July 1980.)

**Part Three: I. B. 2. *Subjects of international law—States—recognition—recognition of governments***

In the course of a debate in the House of Lords on the political and economic situation in Cyprus, the Government Minister, Lord Trefgarne, remarked in respect of the problem of air transport between the United Kingdom and northern Cyprus:

The position is that the Cyprus Government have declared that they do not consider Ercan Airport to be an approved airport under Cyprus legislation, nor a designated customs airport in accordance with the relevant provisions of the Chicago Convention of 1944. Since Her Majesty's Government recognise only one government in Cyprus—that of the Republic of Cyprus under President Kyprianou—we are obliged to prohibit both private and scheduled flights between that airport and the United Kingdom. (H.L. Debs., vol. 405, col. 796: 20 February 1980; see also H.C. Debs., vol. 980, Written Answers, col. 51: 3 March 1980.)

On 28 April 1980 the Secretary of State for Foreign and Commonwealth Affairs delivered the following important written answer in the House of Lords. A similar written answer was delivered in the House of Commons on 25 April 1980 by the Lord Privy Seal.

Following the undertaking of my right honourable friend the Lord Privy Seal in another place on 18th June last [see UKMIL 1979, p. 294] we have conducted a re-examination of British policy and practice concerning the recognition of Governments. This has included a comparison with the practice of our partners and allies. On the basis of this review we have decided that we shall no longer accord recognition to Governments. The British Government recognise States in accordance with common international doctrine.

Where an unconstitutional change of régime takes place in a recognised State, Governments of other States must necessarily consider what dealings, if any, they should have with the new régime, and whether and to what extent it qualifies to be treated as the Government of the State concerned. Many of our partners and allies take the position that they do not recognise Governments and that therefore no question of recognition arises in such cases. By contrast, the policy of successive British Governments has been that we should make and announce a decision formally 'recognising' the new Government.

This practice has sometimes been misunderstood, and, despite explanations to the contrary, our 'recognition' interpreted as implying approval. For example, in circumstances where there might be legitimate public concern about the violation of human rights by the new régime, or the manner in which it achieved power, it has not sufficed to say that an announcement of 'recognition' is simply a neutral formality.

We have therefore concluded that there are practical advantages in following the policy of many other countries in not according recognition to Governments. Like them, we shall continue to decide the nature of our dealings with régimes which come to power unconstitutionally in the light of our assessment of whether they are able of themselves to exercise effective control of the territory of the State concerned, and seem likely to continue to do so. (H.L. Debs., vol. 408, cols. 1121–2: 28 April 1980; H.C. Debs., vol. 983, Written Answers, cols. 277–9: 25 April 1980.)

In reply to the question how in future, for the purposes of legal proceedings, it may be ascertained whether on a particular date Her Majesty's Government regarded a new regime as the Government of the State concerned, the Secretary of State for Foreign and Commonwealth Affairs wrote:

In future cases where a new régime comes to power unconstitutionally our attitude on the question whether it qualifies to be treated as a Government, will be left to be inferred from the nature of the dealings, if any, which we may have with it, and in particular on whether we are dealing with it on a normal Government to Government basis. (H.L. Debs., vol. 409, cols. 1097-8: 23 May 1980; see also H.C. Debs., vol. 985, Written Answers, col. 385: 23 May 1980.)

In reply to the question whether Her Majesty's Government intended to recognize the regime in Bolivia as the government of that country, the Minister of State, Foreign and Commonwealth Office, wrote:

... the British Government recognize States, not Governments. (H.C. Debs., vol. 989, Written Answers, col. 723: 30 July 1980.)

**Part Three: I. B. 5. *Subjects of international law—States—recognition—non-recognition***

(See also Part Three: III. D. (material on Namibia), *infra*.)

In the course of a debate in the Security Council of the United Nations, the leader of the United Kingdom delegation, Sir Anthony Parsons, stated:

The absence of objection by my delegation to the invitation to Afghanistan to participate in the discussion of this question, and the fact that we have raised no formal challenge to the credentials of the person present here for this purpose, should of course in no way be taken to imply that the United Kingdom Government recognizes the new régime in Afghanistan as the Government of that country. We do not ... (S/PV. 2185, p. 17: 5 January 1980.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote that Her Majesty's Government had no plans to recognize *de jure* the incorporation of Lithuania, Latvia and Estonia into the Union of Soviet Socialist Republics (H.C. Debs., vol. 979, Written Answers, col. 751: 29 February 1980).

In reply to the question what advice Her Majesty's Government has given to British Airways in respect of accepting bookings from persons holding travel documents issued by the Transkei, the Parliamentary Under-Secretary of State, Home Department, wrote:

None formally. The position is that these documents are not acceptable for United Kingdom immigration control purposes as evidence of identity and nationality or as valid passports. (H.L. Debs., vol. 407, cols. 154-5: 17 March 1980.)

In reply to the question whether Her Majesty's Government would



consider recognizing the Palestine Liberation Organization, the Prime Minister wrote in part:

No. We extend official recognition only to governments. (H.C. Debs., vol. 981, Written Answers, col. 294: 20 March 1980.)

In reply to a question asking for Her Majesty's Government's policy towards Morocco and to the armed conflict in Western Sahara, the Minister of State, Foreign and Commonwealth Office, wrote:

Her Majesty's Government enjoys good relations with Morocco. Government policy on the Western Sahara dispute is one of neutrality. The Government do not accept Moroccan claims to the Western Sahara, nor do they recognize the Polisario Front. (H.C. Debs., vol. 985, Written Answers, col. 589: 2 June 1980.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

Her Majesty's Government no longer accord recognition to Governments but continue to recognise States in accordance with common international doctrine. We do not recognise Taiwan as a State, nor do we regard the authorities in effective control there as a Government.

. . . Her Majesty's Government do not regard the nationalist authorities on Taiwan as a Government. (H.C. Debs., vol. 988, Written Answers, col. 41: 7 July 1980.)

In reply to a question, the Lord Chancellor, Lord Hailsham, stated:

Her Majesty's Government do not give the Palestine Liberation Organization any official recognition or exclusive status . . . (H.L. Debs., vol. 412, col. 1043: 31 July 1980.)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

We have not given official recognition to the Polisario Front. It is not the practice of Her Majesty's Government to accord recognition to such movements. In any event, to do so in this case would be inconsistent with our policy of neutrality on the Western Sahara dispute. (H.C. Debs., vol. 991, Written Answers, col. 474: 29 October 1980.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The Government have noted recent press reports that the Soviet Union may be annexing the Wakhan area of Afghanistan but have seen no evidence to substantiate these reports. Any such annexation would be a flagrant breach of the territorial integrity of Afghanistan and would not be recognised by the Government. (H.C. Debs., vol. 992, Written Answers, col. 50: 10 November 1980.)

In the course of a speech on the subject of Afghanistan in the Security Council of the United Nations on 18 November 1980, the leader of the United Kingdom delegation, Sir Anthony Parsons, declared:

I should like to underline once again that the absence of objection by my delegation to the participation of Afghanistan in the discussion of this question and the fact that we have raised no formal challenge to the person present here for this purpose should in no way be taken to imply that the United Kingdom Government recognises the present regime in Afghanistan as the Government of that country. (Text provided by the Foreign and Commonwealth Office.)

In the course of a debate on the subject of East Timor, the Government Minister in the House of Lords, Lord Trefgarne, stated:

Successive British Governments have not felt able to recognise the incorporation of East Timor into Indonesia . . . (H.L. Debs., vol. 415, col. 574: 4 December 1980.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote on the subject of the status of Estonia, Lithuania and Latvia:

Like other Governments, they have accepted as a matter of fact that the territories of the Baltic States have been incorporated into the Soviet Union, but they have never considered the incorporation to be lawful. They have therefore always withheld full recognition of the incorporation of the territories. (H.C. Debs., vol. 995, Written Answers, col. 485: 8 December 1980.)

**Part Three: I. C. 4. *Subjects of international law—States—types of States—dependent States***

(See also Part Seven: II. B. and Part Eight: II. A., *infra*.)

In reply to a question about the future of the Turks and Caicos Islands, the Minister of State, Foreign and Commonwealth Office, wrote:

Turks and Caicos Government Ministers visited London in November to discuss with my right hon. and noble Friend and with me their wish for constitutional advance. Following these discussions, the Turks and Caicos Government have decided that, if they are re-elected later this year, the Islands should move thereafter to a period of internal self-government to be followed by full independence in mid-1982. These constitutional moves would be linked with a special independence aid package amounting over a few years to about £11.8 million in all.

I also held discussions earlier this month with leaders of the Turks and Caicos Opposition. While they accepted independence as the Islands' ultimate destiny, it was their view that this could not be realistically considered for the time being.

Since the Turks and Caicos Government and Opposition hold conflicting views about their future, any constitutional advance must await the outcome of the general election due to be held in the Islands later this year.

(H.C. Debs., vol. 979, Written Answers, cols. 25-6: 18 February 1980.)

In reply to a question, the Secretary of State for the Home Department wrote:

The Channel Islands are internally self-governing dependencies of the Crown. The United Kingdom Government are directly responsible for their external

relations and defence; the Crown is ultimately responsible for their good government. In exercising its responsibilities for the Islands the Crown operates through Ministers of the Crown in their capacity as Privy Councillors. As Home Secretary, I am the member of the Privy Council with particular responsibility for Island matters. (H.C. Debs., vol. 991, Written Answers, col. 78: 27 October 1980.)

In moving the second reading in the House of Lords of the Anguilla Bill, the Government Minister, Lord Trefgarne, stated:

If enacted, the Bill will permit Her Majesty in Council to make the further provisions for the future status and administration of Anguilla that we consider to be necessary at this time. The first subsection of Clause 1 empowers Her Majesty in Council to separate Anguilla from the Associated State of St. Kitts-Nevis-Anguilla on a day to be appointed by Order-in-Council. The second subsection of Clause 1 makes provision for the future constitutional development of Anguilla and the attainment of independent status. For this purpose, the fourth subsection of Clause 1 ensures that draft Orders-in-Council receive the approval of each House of Parliament before submission to Her Majesty.

The Anguilla Act of 1971, to which I have already referred, is repealed by subsection (5) of Clause 1, but subsection (6) ensures that Orders-in-Council which have been made under that Act and the appointment under that Act of the Commissioner shall not be affected by this repeal. Provided that the Bill before your Lordships is duly passed into law and the necessary order made under Clause 1 (1), Anguilla will assume the status of a separate dependent territory of the United Kingdom. Thereafter, it will be for the Government and people of Anguilla to determine whether they wish to continue their present constitutional relationship with Her Majesty's Government—which has existed, *de facto*, for nearly 10 years—or become a fully independent state. Though there has been no indication that Anguilla intends to seek independence at an early date, Clause 1 (3) of the Bill, as I have said, makes provision for the several constitutional options on independence which may be exercised in the future. At present, under the provisions of the Anguilla (Constitution) Order 1976, the Anguilla Government enjoys a large measure of autonomy in internal affairs. On formal separation, minor consequential amendments will require to be made to the present constitution order, and it is expected that, with the agreement of the Anguilla Government, the opportunity will be taken to devolve a further modest measure of local autonomy while retaining the ultimate authority of the Crown for the conduct of affairs on the island. Thereafter, in accordance with the policy of successive British Governments, further constitutional advance will only take place in the context of an agreed timetable for independence. (H.L. Debs., vol. 415, cols. 331–2: 2 December 1980; see also H.C. Debs., vol. 996, cols. 125–6: 15 December 1980.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

Hong Kong is a dependent territory administered as part of Her Majesty's Dominions under the Hong Kong Letters Patent 1917 to 1976 and the Hong Kong Royal Instructions 1917 to 1977. (H.C. Debs., vol. 995, Written Answers, col. 161: 2 December 1980.)



In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

In accordance with United Nations General Assembly Resolution No. 35/20 of 11 November 1980, a constitutional conference will be convened in the near future with the intention of bringing Belize to early independence. (H.C. Debs., vol. 995, Written Answers, col. 162: 2 December 1980.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

Her Majesty's Government's policy with regard to independence for the remaining territories for which it has responsibility is to respect the wishes of the local inhabitants as expressed through their elected leaders. Discussions have recently taken place with local administrations in the following instances:

#### *Belize*

I have had several meetings on this subject during the past year with the Premier of Belize and with representatives of the Belizean opposition. A constitutional conference will be called in the near future with the intention of bringing Belize to early independence.

#### *Falkland Islands and Dependencies*

I refer my hon. Friend to the statement I made on 2 December.—(Vol. 995, c. 195.) [See p. 443, *infra*.]

#### *Turks and Caicos Islands*

Talks were held in November 1979 with the then Government of the Turks and Caicos Islands and moves towards independence by 1982 were agreed in principle. The Government reconsidered their position just prior to the elections of November 1980 in which they were defeated. The present Government have said that they prefer to move more slowly towards independence and have not proposed any date.

There has been contact from time to time with the Governments of some of the other Dependent Territories. Of these, the British Virgin Islands, the Cayman Islands, St. Helena and Tristan da Cunha have expressed no wish for independence. As Ascension Island has no permanent inhabitants it will remain a dependency. Montserrat regards independence as an ultimate goal but has expressed no desire for any early moves in this direction. The Bermuda Government are keeping the question under review. No discussions have taken place in the case of Gibraltar, Hong Kong and Pitcairn Island.

As regards the West Indies Associated States, the Antiguan Government obtained a mandate for early independence in the April 1980 elections and a constitutional conference opened in London on 4 December to discuss the details with all interested parties. The St. Kitts-Nevis Government have indicated that independence remains their long-term goal, though they have not set a date. The Anguilla Bill to separate Anguilla from the Associated State of St. Kitts-Nevis, whereby it would revert to full dependent status, has today received Royal Assent. The Anguilla Government have expressed no wish for an early move towards independence, though possibilities of constitutional advance are under consideration. (H.C. Debs., vol. 996, Written Answers, cols. 180-1: 16 December 1980.)

**Part Three: I. D. 1.** *Subjects of international law—States—formation, continuity and succession of States—formation*

In the course of a statement in the House of Lords on the subject of Rhodesia, the Secretary of State for Foreign and Commonwealth Affairs, Lord Carrington, said:

Rhodesia will come to independence as Zimbabwe on Friday, 18th April. Her Majesty the Queen will be represented at the independence celebrations by His Royal Highness the Prince of Wales. I shall represent the Government. My noble friend the Governor of Southern Rhodesia will leave Salisbury on Independence Day. Britain is thus about to terminate its constitutional responsibility for Rhodesia and to transfer power to a Government freely elected, under British supervision, by the Rhodesian people.

... We welcome Zimbabwe's accession to the Commonwealth as the forty-third member. This calls for further legal provisions. An order under the Zimbabwe Act will be laid before Parliament in draft in the next two days for approval by resolution. The principal purposes are to continue the application of certain United Kingdom laws in relation to Zimbabwe notwithstanding its change in status. Similar provision has been made for the application of United Kingdom law in respect of other republics within the Commonwealth. (H.L. Debs., vol. 408, cols. 125-6: 15 April 1980; see also H.C. Debs., vol. 982, col. 1016: 14 April 1980.)

In the course of moving the approval in the House of Commons of the Southern Rhodesia (Sanctions) (Amnesty) Order 1980, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, stated of Zimbabwe:

It is now recognised world-wide as a sovereign and independent country and as a full member of the Commonwealth. (H.C. Debs., vol. 984, col. 430: 7 May 1980.)

In reply to the question

Whether . . . the creation of the State of Israel stemmed from the Balfour Declaration, and . . . Balfour, Lloyd George, Churchill and others believed that the establishment of one democratic state in the Middle East would serve to provide the Jewish people with a place from which they could protect themselves

the Government Minister in the House of Lords wrote in part:

No. The Balfour Declaration recorded that His Majesty's Government favoured the establishment in Palestine of a national home for the Jewish people; it being clearly understood that nothing should be done to prejudice the rights of existing non-Jewish communities in Palestine. There was no mention of a future state. (H.L. Debs., vol. 410, cols. 1589-90: 24 June 1980.)

**Part Three: I. D. 2.** *Subjects of international law—States—formation, continuity and succession of States—identity, continuity and succession*

(See also Part Three: III. F., *infra*.)

In reply to the question what arrangements were being made for the

repayment of Rhodesia 6% stock 1976 to 1979 and arrears of interest to United Kingdom holders, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

The new Government of Rhodesia have made it clear that they intend to honour debts outstanding to the British Government and to private creditors in the United Kingdom. We expect that the Zimbabwe Government will be meeting representatives of the holders of Rhodesian stock fairly shortly after independence to discuss the arrangements for servicing and repayment. (H.C. Debs., vol. 982, Written Answers, col. 309: 3 April 1980.)

In the course of moving the approval by the House of Commons of the draft Zimbabwe (Independence and Membership of the Commonwealth) (Consequential Provisions) Order 1980, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, Mr. Richard Luce, remarked:

Mr. Mugabe has stated that his Government intend to honour the debts outstanding to Her Majesty's Government and to private creditors in Britain as a result of obligations incurred before the illegal declaration of independence in November 1965. (H.C. Debs., vol. 984, col. 462: 7 May 1980.)

In reply to a question on this subject, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

Discussions were held in May and June, as a result of which agreed arrangements have been reached in relation to Her Majesty's Government's claims. In the light of the prospects for the Zimbabwean economy and their consequent capacity to service debt obligations, Her Majesty's Government agreed to write-off £22 million. This relates to Commonwealth development and welfare loans, Commonwealth assistance loans, and certain loans made by the International Bank for Reconstruction and Development, the repayment of which was guaranteed by Her Majesty's Government. . . .

As to the remainder of the debt due to Her Majesty's Government, amounting to some £33 million, it was agreed that there should be a grace period of two years, that the payments should be re-scheduled over a period of eight years thereafter, and that the rate of interest payable on the outstanding amounts from the time of settlement should be 8 per cent.

Agreement has also been reached between the Council of Foreign Bondholders and the Government of Zimbabwe on the terms to be offered to the holders of Government of Southern Rhodesia stocks issued in London, which the council will recommend for acceptance. (H.C. Debs., vol. 987, Written Answers, col. 620: 2 July 1980.)

In reply to the question what action the Government was taking to ensure that the eighteenth-century treaties between the British Government and Indian chiefs in Canada, guaranteeing the human and political rights and economic growth of their peoples, were observed in the projected new constitution for Canada, the Secretary of State for Foreign and Commonwealth Affairs wrote:



As a result of the British North America Act 1867 and the Statute of Westminster 1931, any residual United Kingdom responsibilities towards the Indian peoples of Canada passed to the Canadian Government. It is to the Canadian Government that the Indians should turn if they wish to ensure that their rights are protected. (H.L. Debs., vol. 415, col. 511: 3 December 1980.)

**Part Three: I. E. *Subjects of international law—States—self-determination***

In reply to a question, the Minister of State, Foreign and Commonwealth Office, stated:

Under United Kingdom chairmanship the Security Council approved a resolution of 22 December 1975 upholding the right of the East Timorese to self-determination. We supported a similar resolution on 22 April 1976. With the other members of the European Community we have abstained on subsequent General Assembly resolutions. (H.C. Debs., vol. 978, Written Answers, col. 683: 13 February 1980.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We continue to uphold the right of the people of East Timor to self-determination . . . (H.C. Debs., vol. 979, Written Answers, col. 351: 22 February 1980.)

In a Declaration on the Middle East, issued by the European Council (including the United Kingdom) at its Venice meeting on 12 and 13 June 1980, it was stated:

A just solution must finally be found to the Palestinian problem, which is not simply one of refugees. The Palestinian people, which is conscious of existing as such, must be placed in a position, by an appropriate process defined within the framework of the comprehensive peace settlement, to exercise fully its right to self-determination. (H.L. Debs., vol. 410, cols. 845–6: 16 June 1980; H.C. Debs., vol. 986, col. 1144: 16 June 1980.)

In the course of a speech in the General Assembly of the United Nations, the representative of Luxembourg, speaking on behalf of the nine member States of the European Community, stated:

In substance nothing has changed in Cambodia. In spite of General Assembly resolution 34/22, Viet Nam continues its military occupation of the country and the Khmer population, which wishes only to live in peace, continues to be deprived of its inalienable right to self-determination and of the exercise of the other rights recognized by the Charter and by the Universal Declaration of Human Rights. (A/35/PV. 37, p. 2: 15 October 1980.)

In reply to a question on the subject of East Timor, the Minister of State, Foreign and Commonwealth Office, wrote:

We support the principle of self-determination . . . (H.C. Debs., vol. 995, Written Answers, col. 11: 1 December 1980.)

In the course of a debate on the subject of East Timor, the Government Minister in the House of Lords, Lord Trefgarne, stated:

The United Kingdom therefore voted for the United Nations Security Council's resolutions of 1975 and 1976, which condemned the Indonesian intervention and reaffirmed the right of the East Timorese to self-determination. (H.L. Debs., vol. 415, col. 574: 4 December 1980.)

In the course of his reply to a question on the subject of the legitimacy of the Soviet occupation of Estonia, Latvia and Lithuania, the Minister of State, Foreign and Commonwealth Office, wrote in part:

The Government support the right of all peoples to self-determination. (H.C. Debs., vol. 995, Written Answers, col. 485: 8 December 1980.)

In the course of a debate on the subject of Gibraltar, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, Mr. Richard Luce, stated:

I stress that there is absolutely no need for concern about sovereignty . . . I emphasise that the British commitment is crystal clear. . . it is as solid as the Rock itself, and it is enshrined in the preamble to Gibraltar's constitution, which states: 'Her Majesty's Government will never enter into arrangements under which the people of Gibraltar would pass under the sovereignty of another state against their freely and democratically expressed wishes.' That commitment is reaffirmed in the statement made in Lisbon on 10 April. I was anxious to respond immediately on that singularly important point. (H.C. Debs., vol. 995, col. 1599: 10 December 1980.)

Later in his speech, Mr. Luce remarked:

There can be no sovereignty change without the agreement of the people of Gibraltar. (Ibid., col. 1601.)

**Part Three: II. A. I. (c).** *Subjects of international law—international organizations—in general—legal status—privileges and immunities*

In moving the approval in the House of Lords of the INMARSAT (Immunities and Privileges) Order 1980, the Government spokesman, Lord Trefgarne, stated:

This order, which will be made under the International Organisations Act 1968, was laid before the House on 19th December 1979. The order is required to confer upon the International Maritime Satellite Organisation and persons connected with it, the privileges and immunities provided for by the Draft Headquarters Agreement concluded by the United Kingdom and the Organisation. Copies of that Agreement were laid before your lordships on 13th November 1979. (H.L. Debs., vol. 404, cols. 650-1: 28 January 1980.)

Lord Trefgarne concluded:

Your Lordships will be pleased to learn that the council accepted Her Majesty's Government's invitation to set up its headquarters here. This order is required so that the draft headquarters agreement can be brought into force to provide the organisation with the privileges and immunities it needs to exercise its functions.

INMARSAT's services will be provided on a repayment basis. This, together with the fact that some of the signatories to the operating agreement are not governmental agencies, led us to the conclusion that some of the privileges and immunities regarded as customary for international organisations would not be appropriate for INMARSAT. The headquarters agreement accordingly differs in some respects from agreements negotiated with other international organisations, and the order before Your Lordships reflects these differences. For example, INMARSAT will have only the limited immunity from suit provided in Article 6. Under Article 15, the director-general will enjoy certain immunities, but he will not receive those diplomatic privileges which are often conferred on the executive head of an international organisation. I am sure that your Lordships will welcome the fact that the order contains no provision which confers any immunity from motor traffic offences; and these include parking offences.

Your Lordships may remember approving a previous order concerning INMARSAT. It was made on 11th April 1979, and is revoked by the present order. The 1979 order was very limited in extent and was necessary to enable us to ratify the INMARSAT Convention on 30th April 1979. The provisions of that order are repeated in the order before us today. (*Ibid.*, col. 653.)

On 25 February 1980 the Government of the United Kingdom and the International Maritime Satellite Organization concluded a Headquarters Agreement which entered into force the same day (*United Kingdom Treaty Series*, No. 44 (1980) (Cmnd. 7917)).

In moving the approval in the House of Lords of the Eurocontrol (Immunities and Privileges) (Amendment) Order 1980, the Government Minister, Lord Trefgarne, stated:

The draft Eurocontrol Order is required because of a change which is to be introduced into the tax régime applied to staff members of the European Organisation for the Safety of Air Navigation—or Eurocontrol as it is generally known. The change will mean that from the date on which staff become liable for an internal tax, which will be applied for the benefit of the organisation, they will cease to pay United Kingdom tax on their salaries.

The order will have no effect on the operational working of Eurocontrol, which as your Lordships may recall, was established by convention in 1960. The original aim of the convention was that the agency it established would control both civil and military traffic in the upper air space of member states. However, by the time that the new agency started functioning in 1963, it had become evident that the original aim was incompatible with the integrated system, covering the whole air space and catering for both military and civil air traffic, which we and France were by then developing. Accordingly, the United Kingdom, France and the Republic of Ireland continued to provide their own air traffic control services in the upper air space. Despite this change, Eurocontrol has fulfilled an important role, and contributed to the development of navigational aids in all member states.

Your Lordships may know that a new agreement is being negotiated to provide the framework for a more positive co-operative venture for future safe and efficient air traffic control over Europe, in the future. In the meantime, member countries have been concerned about the practical effects of the present taxation



system which permits members to tax staff salaries, but requires them to refund to the Eurocontrol budget the amount of tax which they collect.

We accepted this requirement because of the principle that the country in which an organisation is situated should not derive benefit from taxing the salaries of staff members stationed in its territory, since these salaries are, of course, provided by the funding of other member states. Although an arrangement to repay the tax which has been collected may appear to be a simple, self-cancelling, transaction, in practice it has proved to involve considerable administrative effort. It has also created financing difficulties for Eurocontrol when delays have occurred in members making their reimbursements to the organisation. To overcome these drawbacks, members have agreed to adopt the method, commonly used by most international organisations, of applying an internal tax system to their staff, and using the proceeds for the organisation's benefit. The agreement to do this is contained in the protocol which was signed by member states in Brussels on 21st November 1978. Copies of that protocol were laid before the House in March last year.

The draft order before your Lordships is for the purpose of giving effect to that agreement. The making of the order will not, of course, result in any reduction in United Kingdom revenue receipts because, as I have said we currently repay to the organisation a sum equal to the amount of tax collected from their staff. This order, if approved, will lead to administrative savings to Her Majesty's Government and remove budget financing delays which have sometimes created difficulties for Eurocontrol. I have therefore no hesitation in commending it to your Lordships. (H.L. Debs., vol. 411, cols. 945-6: 7 July 1980.)

Lord Trefgarne then turned to moving the approval of the International Organizations (Immunities and Privileges) Miscellaneous Provisions Order 1980. He remarked:

I turn now to the second of the draft orders, which is required to take account of changes in customs and excise law. These changes, which were introduced in the Finance (No. 2) Act 1975, made provision for a duty levied at importation to be denoted either a customs duty or an excise duty. Before the 1975 Act, which took effect on 1st January 1976, all duties charged at importation were termed duties of customs, and excise duties were charged on goods produced in the United Kingdom. Certain orders made under the 1968 International Organisations Act contain references to customs duties and excise duties in the sense in which these terms were used before the 1975 Act came into force.

The International Organisations Act itself was brought up to date by the Customs and Excise Management Act of 1979. It is now necessary to up-date those orders listed in the schedule which contain the now superseded, and inappropriate, terminology. The second draft order before your Lordships does no more than bring into line the provisions in the existing orders to which it refers. It does not add to their provisions in any way; neither does it accord any additional privileges to the organisations or to persons connected with them. (Ibid., cols. 946-7.)

In reply to a question, the Lord Privy Seal provided the following table and explanatory note:

Listed below are the organisations to which the representatives of member States

have limited immunity when they are in the United Kingdom on official business related to the work of the organisations. Only a few such representatives come here from time to time, since much of the work in connection with these organisations is handled by diplomatic missions in London.

Those organisations marked with an asterisk in the list employ a total of 1,129 persons in the United Kingdom, who have immunity only in respect of their official acts. The head officers of 11 of those organisations have additional immunity comparable to that of diplomatic agents. Members of the families of all such staff—including the head officers—have no immunity.

Those organisations without an asterisk employ no staff in the United Kingdom, but staff who may occasionally visit the United Kingdom on official business would have immunity only in respect of their official acts.

- \*Inter-governmental Maritime Consultative Organisation (IMCO)
- \*International Wheat Council (IWC)
- \*International Coffee Organisation (ICO)
- \*International Sugar Organisation (ISO)
- \*Eurocontrol
- Caribbean Development Bank (CDB)
- European Organisation for Nuclear Research (CERN)
- International Hydrographic Organisation (IHO)
- \*International Tin Council (ITC)
- Interim Commission for the International Trade Organisation (ICITO)
- International Institute for the Management of Technology (IIMT)
- Asian Development Bank (ADB)
- Customs Co-operation Council (CCC)
- European Molecular Biology Laboratory
- International Atomic Energy Agency (IAEA)
- \*North Atlantic Treaty Organisation (NATO)
- Organisation for European Co-operation and Development (OECD)
- World Intellectual Property Organisation (WIPO)
- \*United Nations, International Court of Justice, and UN Specialised Agencies
- \*European Centre for Medium Range Weather Forecasts (ECMWF)
- \*International Cocoa Organisation (ICCO)
- \*International Whaling Commission (IWC)
- \*Inter-American Development Bank (IDB)
- International Fund for Agricultural Development (IFAD)
- International Monetary Fund (IMF)
- European Patent Office (EPO)
- \*International Rubber Study Group (IRSG)
- European Space Agency (ESA)
- \*International Lead and Zinc Study Group (ILZSG)
- International Telecommunications Satellite Organisation (INTELSAT)
- \*International Oil Pollution Compensation Fund
- \*Oslo and Paris Commissions
- \*International Maritime Satellite Organisation (INMARSAT)
- \*Commission of the European Communities
- \*Council of Europe
- \*European Investment Bank
- \*European Parliament

\*Joint European Torus

\*International Bank for Reconstruction and Development (IBRD)

\*International Finance Corporation (IFC)

International Development Association (IDA)

\*Western European Union (WEU)

International Centre for the Settlement of Investment Disputes (ICSID)

African Development Fund

(H.C. Debs., vol. 989, Written Answers, cols. 467-8: 28 July 1980.)

In moving the second reading in the House of Lords of the International Organisations Bill, the Government Minister, Lord Trefgarne, stated:

This Bill has two main objectives. The first is to remove those provisions of the International Organisations Act 1968 which discriminate against organisations composed of Commonwealth states. The 1968 Act applies only to organisations of which the United Kingdom and at least one foreign state are members; as Commonwealth states are not, legally speaking, foreign, Commonwealth organisations cannot at present be accorded privileges and immunities under the Act.

The second main objective of the Bill relates to the treatment to be accorded to international commodity organisations of which the United Kingdom is not a member. The Bill also makes certain minor changes in the 1968 Act which experience has shown to be necessary. I shall be giving your Lordships details of these in a moment.

Clause 1 of the Bill will enable us to treat Commonwealth organisations in the same way as other organisations. In the past we have had to pass special legislation whenever it was required to grant privileges and immunities to a Commonwealth entity. We did this for the Commonwealth Secretariat in 1966 by the Commonwealth Secretariat Act; and again for the Caribbean Development Bank in the Diplomatic and other Privileges Act 1971. But I am sure your Lordships will agree that there is no reason why Parliamentary time should be taken up with primary legislation on each occasion when privileges and immunities are granted to Commonwealth organisations which would in all other respects qualify for them.

There is no justification for continuing to maintain provisions whereby all Commonwealth international organisations are treated differently from other organisations with comparable functions. Indeed, to do so might be considered as detracting from the high regard we attach to the Commonwealth and its 44 member states. Parliament will still have control in this matter, since an Affirmative Resolution by each House will be required for any Order in Council relating to these organisations. Clause 1 also contains a provision which will allow us to treat conferences attended solely by Commonwealth representatives in the same way as we do other international conferences.

There are two Commonwealth organisations in the United Kingdom which have sought similar benefits to those granted to the Commonwealth Secretariat. These are the Commonwealth Telecommunications Organisation and the Commonwealth Agricultural Bureaux. I very much hope that early enactment of the Bill we are now considering will allow us to demonstrate that we hold these admirable examples of Commonwealth co-operation in no less regard than other organisations. Clause 2 achieves the other main objective of the Bill by enabling a limited range of privileges and immunities to be granted to an international



commodity organisation of which the United Kingdom is not a member but which has an office in this country.

Under the present terms of Section 4 of the 1968 Act, the only privilege which can be accorded to international organisations of which the United Kingdom is not a member is exemption from taxes on income or capital gains. No provision exists for according the staff of such organisations personal immunities and privileges such as exemption from United Kingdom income tax or Customs privileges on first arrival. London has long been recognised as the centre of the world commodities trade. There are now seven producer/consumer commodity organisations established here of which we are a member. We hope that the headquarters of future international commodity organisations will also be located in London. Such organisations are accustomed to receiving fiscal reliefs because their funds are provided by their member Governments and it is an internationally accepted principle that one state does not tax another in respect of non-commercial activities.

Our present practice of distinguishing between organisations according to whether the United Kingdom is a member or not is not followed by all European countries. This therefore puts us at a disadvantage. We believe that we should now help to maintain London's pre-eminent position in world commodity markets by making available to such organisations a limited range of fiscal reliefs so as to make it more attractive for them to establish themselves here. Clause 2 of the Bill therefore empowers the making of orders whereby international commodity organisations of which the United Kingdom is not a member, and persons connected with such organisations, may enjoy certain privileges and immunities which are defined by reference to the schedule in the 1968 Act.

With permission, I will recite these briefly. First, the organisation's premises and archives may be granted inviolability; secondly, the organisation may be exempted from taxes and Customs duties and be given relief from rates; thirdly, representatives to the organisation and members of their diplomatic staff may have their personal baggage exempted from search, but this does not preclude the authorities from inspecting their baggage if they have grounds for presuming that it contains prohibited articles; fourthly, the official papers of representatives and their staff may be made inviolable; fifthly, representatives and their staff may be accorded immunity from suit and legal process, but only in respect of their official acts; and sixthly, officers of the organisations may be exempted from national insurance contributions and income tax and be granted Customs privileges on their first arrival in the country.

What Clause 2 does not do is to allow such organisations to be accorded any immunity from suit or legal process. Thus, actions can be instituted against the organisations and against their staff and representatives if, for example, they do not pay their bills. Your Lordships will be glad to note that Clause 2(4) specifically precludes representatives and their staffs from receiving immunity in respect of motor traffic accidents and offences, including of course parking offences.

Those, then, are the privileges and immunities which we propose should be available for certain international commodity organisations. But it does not follow that every organisation which comes here will in fact enjoy them all. The Bill will give us the power to accord them, but only when we have an obligation to do so by means of an agreement negotiated with the organisation. Such an agreement

would set out precisely the extent of the privileges and immunities, within the limits I have just outlined, which it had been agreed were essential for the efficient and effective functioning of the organisation. To give effect to that agreement, an Order in Council will have to be made and that order will require an Affirmative Resolution from each House. This procedure will ensure that Parliament retains its control over the extent of the privileges and immunities conferred in each case.

Existing commodity organisations do not have very large staffs and it is unlikely that the numbers of persons who might be covered by the provisions of Clause 2 will be large. The proposals will not therefore significantly increase the numbers of persons enjoying immunity, and such immunity will in any case be strictly limited to the official acts of the persons concerned. We therefore believe that this move to enhance London's position in world commodity trading can be achieved without any untoward effects. The tax exemptions provisions may appear to show that there will be some loss in the Revenue, but we know that without tax exemptions organisations will not come here. We would not then enjoy the gain of tax resulting from the taxable trade which the organisations and persons connected with them will generate here. Any loss is apparent and not real.

I turn to the other provisions of the Bill which are to rectify deficiencies discovered in the 1968 Act during the 12 years of its operation. Clause 3 is concerned with representatives to a conference convened by an international organisation. Under the present terms of the 1968 Act, provision may be made by Order in Council for privileges and immunities to be granted to representatives to an organisation covered by Section 1(1) or to members of any subordinate body of the organisation. Such privileges and immunities are normally required for meetings of the organisation or subordinate body in the United Kingdom. However, if an organisation holds a conference in the United Kingdom to which representatives of member countries are invited, those representatives can be granted privileges and immunities only if a separate order is made in respect of each such conference under Section 6 of the Act. This is an unnecessarily complex requirement. We need a simpler procedure so that when an order is made to implement any future agreement with an international organisation, that order may contain a provision to cover representatives to conferences convened by the organisation. Clause 3 inserts in the Act a new Section 5A which achieves this aim.

Clause 4 of the Bill relates to immunities for representatives of the United Kingdom to the Assembly of the Western European Union and the Consultative Assembly of the Council of Europe. We are bound by our agreements with the Western European Union and the Council of Europe to ensure that our representatives to the respective assemblies enjoy in the United Kingdom the immunities we accord to all Members of Parliament during Sessions of Parliament. We were able to provide such immunity under the International Organisations Act 1950, but when that Act was replaced by the 1968 Act, the wording of the appropriate section was changed so that representatives of the United Kingdom are excluded from any privilege or immunity. That the change in wording should have had this effect was quite unintentional; Clause 4 restores our ability to comply with our international obligations in respect of the Western European Union and the Council of Europe.

Clause 5(1) of the Bill has the effect of adding a new paragraph 9A to Schedule I to the 1968 Act to enable inviolability to be accorded in respect of the official premises of a representative. We expect that the growth of international

organisations having their headquarters in London will lead some states to establish here permanent missions to these organisations. If so, we should be able to accord to these official premises similar inviolability to that accorded to diplomatic missions. Not to be able to do so is illogical and inconsistent with the existing provision in the Act granting inviolability to the private residence of a representative to an international organisation.

Clause 5(2) and (3) make amendments to paragraphs 10 and 16 of Schedule I to the 1968 Act relating to import privileges. Some of our agreements with the international organisations based here provide the right for senior officers, by analogy with diplomatic agents, to import goods for their personal use, and for the use of members of their families. Although the 1968 Act provides for such imports to be exempted from Customs duties or taxes, it does not provide for the right to effect such imports. Diplomats enjoy this right, although of course they must comply with our laws and regulations. This fairly technical amendment ensures that senior officers of international organisations are not treated differently from diplomats in this respect. It will not grant the right to import items such as drugs, arms, or explosives in contravention of the law.

Finally, I should like to mention the repeals made by the Bill. These are set out in the schedule. The list may appear to be inordinately long and colourful for such a Bill, but the repeals result mostly, almost entirely, from the provisions of Clause 1(3), which have the effect of allowing representatives to Commonwealth conferences to be treated similarly with 'foreign' representatives. This makes possible the repeal of the Diplomatic Immunities (Conferences with Commonwealth Countries and Republic of Ireland) Act 1961, which made special provision for Commonwealth conferences. All the other Acts and orders mentioned in the schedule (except the 1968 Act itself) added the name of a specific Commonwealth country, on its attainment of independence, to the list of countries in the 1961 Act, and may now be repealed to the extent shown. (H.L. Debs., vol. 415, cols. 881-5: 15 December 1980.)

**Part Three: II. A. 2. (b).** *Subjects of international law—international organizations—in general—participation of States in international organizations—suspension, withdrawal and expulsion*

In reply to the question whether Her Majesty's Government will propose to the General Assembly of the United Nations that Byelorussia and the Ukraine be expelled from the United Nations in furtherance of the policy of securing Soviet withdrawal from Afghanistan, the Minister of State, Foreign and Commonwealth Office, wrote:

Expulsions from the United Nations can take place only on the recommendation of the Security Council, where the Soviet veto applies. (H.C. Debs., vol. 983, Written Answers, cols. 475-6: 29 April 1980.)

**Part Three: II. A. 2. (d).** *Subjects of international law—international organizations—in general—participation of States in international organizations—representation*

In the course of a debate on 5 December 1980 in the Sixth Committee of the General Assembly of the United Nations, the representative of the United



Kingdom, Mr. D. H. Anderson, made the following observations on the subject of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character:

The Convention had been adopted by a divided vote. The views of the United Kingdom at the Vienna Conference of 1975 on a series of important issues had not been taken into account. All delegations at the Conference had had interests as sending States, but a small number of delegations, including his own, had also had interest as host States. Those interests had not been adequately reflected in the text of the Convention.

Moreover, the Convention had not received half the number of ratifications specified for its entry into force. According to his information, there were only 17 parties to the Convention, more than half of which were communist countries. No Western country had ratified it. Those factors indicated that something was wrong with the Convention. The negotiation had not been successful. There had been a failure in the multilateral treaty-making process. Accordingly, in the view of his delegation, it was inappropriate for the General Assembly to seek to exert pressure on Governments to ratify.

As a general principle, it was desirable to limit the grant of privileges and immunities for individuals to ones which were strictly necessary to enable them to perform their functions freely and efficiently. The Convention went beyond that criterion, although no evidence had been produced that any particular difficulties had been experienced in practice. To grant such extensive privileges and immunities would require changes in the legislation of many States, including the United Kingdom. Proposals for such legislation would have to be discussed in Parliament.

For those reasons, his delegation felt that it was inappropriate to single out host States and to seek to exert pressure in the particular circumstances surrounding the Convention.

. . . An entity other than a State could not be regarded as the same as the Government of a State. It did not have the same ability as a Government to provide the guarantee of good conduct and behaviour which a host country must have as a guarantee against abuses of its hospitality. (A/C.6/35/SR. 75, p. 8.)

**Part Three: II. A. 3. *Subjects of international law—international organizations—in general—legal effects of acts of international organizations***

(See also Part Four: VII. (reply of 28 April 1980), *infra*.)

In reply to the question whether

in the light of the decisions of the United Nations General Assembly Resolution 2145 of 1966, the Security Council Resolution 269 of 1969 and the United Nations Decree No. 1 of 1974, United Nations member States are entitled to seize cargoes of uranium from Namibia en route to Great Britain

the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

No. The Security Council cannot take decisions that are generally binding on member States or that entitle them to take action which is in the nature of sanctions, unless there has been a determination under article 39 of the United

Nations Charter of the existence of a threat to peace, a breach of the peace or an act of aggression. There has been no such decision over Namibia.

The United Nations Charter confers upon the General Assembly powers which, with certain exceptions of very limited scope, are recommendatory. Neither it, nor a subordinate body, in this case the Council of Namibia, was competent to take executive or legislative decisions of the kind in question.

Successive Governments have maintained, therefore, that these provisions do not oblige member States to refrain from importing uranium from Namibia, nor do they entitle member States to seize cargoes of uranium from Namibia en route to this country or elsewhere. (H.C. Debs., vol. 982, Written Answers, cols. 36-7: 31 March 1980.)

In the course of a debate in the House of Commons on the subject of the American hostages in Iran, the Prime Minister, Mrs. Margaret Thatcher, stated:

With regard to any possible measure of sanctions, in the absence of a United Nations resolution I believe that we should have to ask the House for the necessary legislative authority. A Government have no powers under international law just to break contracts that are valid in international law, unless there is a mandatory resolution of the United Nations, which automatically becomes embodied in our law, or unless we take specific legal action. (H.C. Debs., vol. 982, col. 798: 14 April 1980.)

In the course of a statement on the subject of Rhodesia, the Lord Privy Seal, Sir Ian Gilmour, remarked:

Now that full amnesty has been granted to all those responsible for the situation which led to the imposition of sanctions, the Government feel that it would no longer be appropriate for any further prosecutions to be initiated for sanctions offences.

The measures applying sanctions in United Kingdom law have, of course, been revoked. I am informed . . . that only one case, an appeal, is at present before the courts, and that no other prosecutions are pending. The amnesty will not reopen past judgments. An order will be laid before Her Majesty in Council in due course to give effect to this decision. (H.C. Debs., vol. 982, col. 1016: 15 April 1980.)

In reply to a question asking the Prime Minister if she would 'issue a correction of her statement that a mandatory resolution of the United Nations automatically becomes embodied in our law', the Prime Minister wrote:

Section 1 of the United Nations Act 1946 provides as follows: 'If, under Article forty-one of the Charter of the United Nations . . . the Security Council of the United Nations call upon His Majesty's Government in the United Kingdom to apply any measures to give effect to any decision of that Council, His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied'. (H.C. Debs., vol. 982, Written Answers, col. 730: 18 April 1980.)

On 19 November 1979 the Lord Privy Seal gave a written answer in reply

to the question what categories of European Community legislation, and what other resolutions or instruments of any other international body, are binding on Her Majesty's Government (H.C. Debs., vol. 974, Written Answers, cols. 13-14; UKMIL 1979, p. 311). On 21 April 1980 the Lord Privy Seal gave the following supplementary reply:

The following additional information to paragraph 2 might be helpful. As well as the bodies there mentioned, certain other international bodies have defined powers, under international agreements to which the United Kingdom is a party, to adopt decisions which are binding on member States. The most notable example is the governing board of the International Energy Agency, which has the power to take binding decisions for the implementation of emergency measures in the event of an oil supply crisis. Such decisions would be put into effect by means of Orders in Council under section 3 of the Energy Act 1976, which requires that the orders be laid before Parliament after making, but does not subject them to any other parliamentary procedure. In addition, it may be possible for certain States to invoke the compulsory jurisdiction of international tribunals, such as the International Court of Justice, and bring proceedings against the United Kingdom which would lead to a decision by the tribunal binding on the parties.

Less far-reaching powers are possessed by bodies such as the International Development Association, the International Monetary Fund and the Council of Ministers of the Council of Europe—in relation to the functioning of the European Convention on Human Rights. Where necessary, appropriate provision has been made for the implementation of decisions of the first two of these bodies under Acts of Parliament such as the International Development Act 1964 and the Overseas Aid Act 1968, and the International Monetary Fund Acts 1968 and 1979. (H.C. Debs., vol. 983, Written Answers, cols. 39-40: 21 April 1980.)

In reply to questions about the import by the United Kingdom of uranium from Namibia and in particular whether such trade was contrary to United Nations General Assembly 'decisions', including a 'decree' of 13 December 1974, the Government Minister, Lord Trefgarne, stated:

The contract between Rossing Uranium Limited and British Nuclear Fuels Limited, approved by previous Governments, conflicts with none of our international obligations. United Nations decisions on the subject are not binding in international law.

... we do not accept that the United Nations General Assembly acted within its competence under the UN Charter in setting up the council. May I add that mandatory sanctions, such as I think the noble Lord thinks exist, can in fact only be imposed by the Security Council after a finding under Chapter 7 of the UN Charter that there exists a threat to international peace. In this case no such finding has been made.

... there is no question of any contravention of international law in this matter. The position is quite clear. The resolutions which we are talking about are not binding upon members of the United Nations. (H.L. Debs., vol. 408, cols. 757-9: 23 April 1980.)

In the course of a debate on the occasion of the second reading in the



House of Commons of the Iran (Temporary Powers) Bill, the Minister of State, Foreign and Commonwealth Office, Mr. Douglas Hurd, considered the results of the decision to impose sanctions on Iran. He remarked:

. . . we have looked at the powers that the Government already possess to see whether they might be sufficient for the purpose that we have in mind. The United Nations Act 1946 would have been the right instrument if the Security Council had passed its resolution on 15 January without a Soviet veto. The resolution could have been put into our national legislation by means of the United Nations Act 1946. It would have been mandatory. That is no good because of the Soviet veto. (H.C. Debs., vol. 984, col. 918: 12 May 1980.)

In the course of a debate on the Iran (Temporary Powers) Bill, the Government Minister in the House of Lords, Lord Trefgarne, stated:

Several noble Lords raised the question of the General Assembly and the possibility of using the uniting for peace procedure. The difficulty with that procedure is that the resolutions that might flow from the General Assembly are not in general binding and do not have the same effect as a Security Council resolution under Article 41 . . . (H.L. Debs., vol. 409, col. 413: 15 May 1980.)

In the course of preliminary comments, dated 28 May 1980, on the Draft Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment, the United Kingdom Permanent Mission to the United Nations remarked:

. . . the UK wishes to record its understanding that the proposed Declaration is intended to be an instrument which is not legally binding on States. There would accordingly be advantage in redrafting the Declaration so as to avoid language, such as the use of 'shall', which is more appropriate to a text which is intended to be legally binding and to establish legal rights and obligations. (Text provided by the Foreign and Commonwealth Office.)

In reply to the question what action was proposed to implement resolution 1980/59 on activities of transnational corporations in South Africa and Namibia which was adopted by the United Nations Economic and Social Council on 24 July 1980, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

None. Resolutions of the Economic and Social Council are not binding. (H.C. Debs., vol. 995, Written Answers, col. 244: 3 December 1980.)

**Part Three: II. B. 1.** *Subjects of international law—international organizations—particular types of international organizations—universal organizations*

(See also Part Three: II. A. 2. (b). and (d). and II. A. 3., *supra*; Part Thirteen: I., *infra*.)

In reply to the question whether Her Majesty's Government would seek a resolution in the United Nations that any member State in arrears with

its subscription for more than nine months should, while the arrears were outstanding, forfeit any right to exercise a vote, the Secretary of State for Foreign and Commonwealth Affairs wrote:

No. A General Assembly resolution would not override the United Nations Charter, which contains no provisions concerning forfeiture of the veto. (H.L. Debs., vol. 409, col. 1248: 2 June 1980.)

In a speech explaining the United Kingdom's vote on a resolution recommended by the Credentials Committee, the United Kingdom Permanent Representative to the United Nations in New York, Sir Anthony Parsons, declared in the General Assembly on 16 October 1980:

... we voted earlier this week against the amendment introduced by Laos to the resolution recommended by the Credentials Committee. We did so with the greatest reluctance. We should have been far happier had there been another way of opposing the aggression. For, faced with a choice between Pol Pot and the Vietnamese invader, our natural reaction is to say: a plague on both your houses. Unfortunately we could not afford that luxury: not only is an empty seat solution unacceptable on grounds of principle and precedent but, as the distinguished permanent representative of Singapore has pointed out, nature abhors a vacuum in politics as well as in physics. The 73 other countries who voted against the amendment, most of whom share our loathing for the Pol Pot régime, evidently took the same view.

... The fact that my delegation voted against the amendment to the report does not imply that my Government supports the authorities issuing the credentials in question or deals with them as a Government. ... At this stage I would simply make it clear that, in casting our vote today for wider reasons, we have no intention of contributing to the re-establishment of the authority of the Pol Pot régime, nor do we see any grounds for expecting this to happen. (Text provided by the Foreign and Commonwealth Office.)

In the course of a debate in the House of Lords on the subject of Britain's role in the United Nations, the Government Minister, Lord Trefgarne, stated:

The Security Council—and the General Assembly, too—are committees of states, not supranational institutions, and their ability to act and to influence events is a function of the willingness of states to work out common positions and strive for common goals. (H.L. Debs., vol. 415, col. 1168: 17 December 1980.)

**Part Three: II. B. 3.** *Subjects of international law—international organizations—particular types of organizations—organizations constituting integrated communities*

(See also Part Four: V., *infra*, and Part One: II. A., *supra*.)

The following statement about the structure and work of the European Court of Justice was given by the Attorney-General, Sir Michael Havers, on a motion that the House of Commons took note of European Council

documents Nos. R/2075/78 and 4679/79 on the reorganization of the Court of Justice. It is set out here as a matter of general interest.

The Court consists of nine judges. Although the treaties impose no nationality requirement, in practice there is one judge from each member State. The nine judges are assisted by four advocates-general, who rank equally with the judges. Again, the treaties impose no nationality requirement, but by a tacit understanding there is one from each of the four large member States—the United Kingdom, France, Germany and Italy.

The functions of the advocates-general are very different from those of the judges. I shall attempt to describe them, because an understanding of their functions is central to the Court's proposals, and we have no equivalent officer in our judicial system.

The duty of the advocate-general is, acting impartially, to make reasoned submissions in open court on cases brought before the Court of Justice to assist the Court in its interpretation and application of Community law. He does this after the parties have completed their written and oral submissions, so that, while he may be influenced by those submissions, it is not possible for the parties to comment on the submissions of the advocate-general. He does not retire with the judges to defend his submissions before them, as the advocate-general does in the French legal system, and the Court is entirely free to accept or reject his conclusions, or to reach the same conclusions by a different line of reasoning. This occurs in a substantial number of cases.

The nature of the cases with which the Court has to deal varies widely. Of first importance are cases brought by the Commission against a member State, or by one member State against another, alleging a failure to fulfil an obligation under the treaties. Conversely, a member State may ask the Court to declare that a regulation, directive or decision of the Council or the Commission is illegal, and individuals and companies have the same right in the case of instruments which are of particular interest to them. These cases are all direct actions, in which the Court determines the dispute finally as between the parties—assuming, of course, that the parties comply with the Court's judgment, which, as we know, is not always the case.

A second category of case—by far the largest—is where the Court is asked by a national court of a member State to rule on the validity or interpretation of a provision of the treaties or of secondary legislation made under them. Cases of this type vary greatly in importance, depending on the principle of Community law that is being interpreted.

Last in order of importance, and well down the list, come disputes between the Communities and their officials and staff. These cases are plainly of importance to those concerned, but to us they are important only because a substantial proportion of the time of those eminent judges is occupied in determining disputes which, for example, in this country, would be heard by an industrial tribunal. (H.C. Debs., vol. 977, cols. 361–2: 22 January 1980.)

In reply to the question whether the amendments proposed by the E.E.C. Assembly to the obligatory expenditure section of the E.E.C. budget were contrary to Article 137 of the Treaty of Rome, the Prime Minister wrote:



The second sub-paragraph of article 203-4 of the Treaty, dealing with the budgetary powers of the Parliament, states that the European Parliament may propose to the Council modifications to the draft budget relating to expenditure 'necessarily resulting from this Treaty or from acts adopted in accordance therewith' commonly known as obligatory expenditure. It is therefore clear that the modifications proposed by the European Parliament to obligatory expenditure in the 1980 draft budget were entirely in accordance with the relevant provisions of the Treaty. (H.C. Debs., vol. 978, Written Answers, col. 117: 5 February 1980.)

In reply to the question whether it was the view of Her Majesty's Government that authority existed in the E.E.C. Treaty for the Assembly elected by direct universal suffrage to exercise other than advisory and supervisory powers expressly conferred upon it by the Treaty; and for the publication of a list of those powers, the Prime Minister wrote:

There is no authority in the treaty for the directly-elected Parliament to exercise any power other than those conferred on it by the treaties.

The Parliament exercises advisory powers when it uses its right under a treaty provision to express its opinion or make a recommendation. There are numerous instances throughout each of the Community treaties where consultation of the Parliament is mandatory in the legislative process, but in none of these instances is the Council required to follow the advice given by the Parliament.

The Parliament exercises supervisory powers of two kinds—budgetary powers and powers in relation to the Commission.

The budgetary powers may be summarised as follows:—

(1) The Parliament can amend any provision in the draft community budget relating to non-obligatory expenditure—almost all expenditure items except those connected with the CAP. The Parliament has the last word subject to a ceiling on total expenditure—calculated by the Commission—which can be overstepped only by agreement of both Parliament and Council;

(2) The Parliament can also propose to modify items of obligatory expenditure—that is, largely CAP. If these modifications increase expenditure they fall unless approved by a qualified majority vote in the Council. If they do not increase overall expenditure they stand unless rejected by the Council's qualified majority vote;

(3) The Parliament has the power to adopt the budget;

(4) The Parliament may reject the entire draft budget by a majority of its members and two-thirds of the votes cast.

The Parliament may require the Commission to reply orally or in writing to questions put to it either by the Parliament or by its members. By passing a vote of censure by a two-thirds majority on the Commission the Parliament may force it to resign as a body. (H.C. Debs., vol. 978, Written Answers, cols. 242-3: 6 February 1980.)

In reply to a question on the subject of the future of the Exchange Control Act 1947, the Chancellor of the Exchequer wrote:

... simple repeal would not be compatible with our Treaty obligations.

... the Act needs to be kept in being because the United Kingdom Government

are required, under the European Community Council Directive 72/156 of 21 March 1972, to have available certain instruments for effective regulation of international capital flows and for neutralising those effects of such flows on domestic liquidity which are considered undesirable. The Directive also requires that these instruments may be able, where necessary, to be put into operation without further enabling measures. The Exchange Control Act 1947 is the only current legislative authority in the United Kingdom under which the Government could take such action. (H.C. Debs., vol. 984, Written Answers, col. 672: 16 May 1980.)

In moving the adoption of the draft European Communities (Definition of Treaties) (International Railway Tariffs Agreements) Order 1980, the Government Minister in the House of Lords, Lord Mowbray, stated:

When Britain joined the European Economic Community in 1973 there was in existence an agreement between the six members of the European Coal and Steel Community, made in 1955, regulating the carriage of coal and steel products by rail within the Community. In addition to this original agreement there were two supplementary amending agreements on points of detail; and the requirements of the 1955 agreement were extended to traffic between the Community and Switzerland and Austria by separate agreements made in 1956 and 1957 respectively. The draft order which is before the House resolves the long-standing difficulty which the United Kingdom has had in conforming with the terms of these agreements.

. . . in 1956 and 1957 the six members of the then Community negotiated agreements with Switzerland and Austria extending the provisions of the 1955 agreement to traffic with those countries. Although those agreements preceded the accession of the United Kingdom to the European Community, unlike the 1965 agreement they were not automatically binding upon us when we joined the Community, and it was necessary to negotiate separate protocols providing for the accession of the new member states to the 1956 and 1957 agreements, to which we were committed by Article 4(2) of the Act of Accession. These protocols were eventually concluded in October 1974. They contained a requirement for the member states to notify the Swiss and Austrian Governments that the conditions necessary for their entry into force had been fulfilled in accordance with domestic law. This presented the difficulty for us that, for the reasons which I have explained, the provisions of the 1955 agreement were not wholly compatible with our law and practice relating to international rail traffic. The Government at the time delayed giving the required notification in the hope that a suitable revision of the 1955 agreement would first be negotiated.

However, a position was eventually reached in which it became clear that no further progress could be made towards such revision to meet our position until we had given the necessary notification under the Swiss and Austrian protocols to which we had been a signatory. It was contended that for this purpose reliance could be placed on the fact that the Government had secured substantial compliance with the requirements of the base agreements through the informal tariff introduced by British Rail in 1975. The British Railways Board in March 1978 gave a formal undertaking to continue to conform to the three agreements (that is, those of 1955, 1956 and 1957) 'in the manner currently observed', on the

understanding that the 1955 agreement was intended to be revised 'to make the agreement compatible with the conditions under which the transport of European Coal and Steel Community goods takes place between the United Kingdom and the Community'; and Her Majesty's Government subsequently gave the required notification later in 1978.

Negotiations for a revision of the 1955 agreement then resumed, and the Fourth Supplementary Agreement, meeting the position of British Rail, was approved and formally signed by the member states of the Community meeting in council on 6th December last. This in effect formally legitimises the practice which British Rail have been following since 1975, by allowing them to calculate charges 'by analogy' and by providing for a separate charge by sea crossing.

The British Railways Board, on 19th May, gave a new undertaking to comply with the original agreement as now amended, and the way is thus at last clear for these interrelated post-accession agreements to be specified as Community Treaties under the European Communities Act of 1972, so that their provisions may be relied upon directly by virtue of Section 2(1) of that Act. (H.L. Debs., cols. 1388-91: 10 July 1980.)

In the course of a statement on the subject of air transport licensing appeals, the Government Minister in the House of Lords, Lord Trefgarne, referred to Laker Airways' appeal against the Civil Aviation Authority's decision on its application for approximately 600 routes in Europe. He went on:

The key issues in this case were: whether our domestic licensing system and the series of bilateral agreements with foreign governments are incompatible with the provisions of the Treaty of Rome—rendering the whole of the regulatory machine redundant; and whether the applicant provided sufficient evidence to satisfy the economic requirements of the legislation.

On the first point, Laker argued strongly that the whole system is incompatible with the Treaty of Rome. The Government's legal opinion is that there is no provision of Community law which overrides the regulatory systems of member Governments . . . (H.L. Debs., vol. 413, col. 1826: 21 October 1980.)

In reply to a question about discrimination in fees for further and higher education, the Government Minister in the House of Lords wrote:

Student admissions is not one of the subjects of the Treaty of Rome and discrimination in the charging of fees for students whose homes are in other member states is not prohibited under Community legislation. (H.L. Debs., vol. 413, col. 2135: 23 October 1980.)

In reply to a question on the subject of subsidized finance for Italian exporters, the Parliamentary Under-Secretary of State, Department of Trade, wrote:

With some minor exceptions which require European Commission approval, export subsidies for intra-Community trade are contrary to article 92 of the Treaty of Rome. Subsidies for exports outside the Community are outside the scope of this treaty but are subject to the provisions of the General Agreement on Tariffs and Trade and the international agreement on guidelines for



export credit (the so-called 'consensus') in which the Community as a whole participates.

One minor exception is that Italy refunds certain internal taxes on exports of mechanical engineering products to other member States. The refunds were fixed at their present rates in 1973 following decision of the European Court of Justice which considered their conformity with article 96 of the Treaty of Rome. Their value is insignificant and I know of no grounds for challenging them. (H.C. Debs., vol. 992, Written Answers, cols. 316-17: 13 November 1980.)

In reply to a question on the subject of subsidies to and unfair trading practices by Italian exporters to the United Kingdom, the Secretary of State for Trade wrote:

Trade within the Community must be fair as well as free. It is, in fact, regulated by the competition rules of the Community treaties, which prescribe not only a standard of 'fairness' but a framework of law to enforce it.

Specifically, article 92(1) of the Treaty of Rome in general forbids all State aids which distort competition in trade between member States or threaten to do so. This applies equally to Italy, the United Kingdom and all other member States.

The primary responsibility for enforcing observance of the treaty competition rules rests with the Commission, acting on behalf of the Community as a whole. Particularly since it has to determine the requirements of the law, rather than make a subjective judgment of 'fairness', the Commission can act only on evidence; it cannot proceed on the basis of unsubstantiated presumptions. Moreover, evidence is required of a specific breach of the Community treaties. According to the law, 'unfair' competition within the Community can only be understood in this sense. (H.C. Debs., vol. 995, Written Answers, cols. 287-8: 4 December 1980.)

In the course of a debate on the subject of proposed E.E.C. regulations for whale products, the Parliamentary Under-Secretary of State, Department of the Environment, Mr. Marcus Fox, stated:

The one remaining major issue is the legal barriers of the regulations. The Commission argued that, as the ban was on trade, article 113 of the Treaty of Rome applies. The Council, however, maintained that since the reason for having the ban was to conserve whales and other cetaceans, article 235 should apply.

The majority of States, including the United Kingdom, supported article 113, but two held out for article 235. A compromise of basing the regulation on both articles has been considered but has not yet been accepted. It is, in effect, this impasse which is preventing adoption of the regulations, and I am hoping we can break the deadlock at the meeting of the Council of Ministers on Friday 12 December which I shall be attending. It is quite clear that the Treaty was drafted to allow the Community to act in this way, and I am sure we can find a solution. (H.C. Debs., vol. 995, col. 1093: 8 December 1980.)

In the course of replying to a question, the Lord Privy Seal wrote:

. . . independent action by member States on dumping or other unfair trade practices by third countries would be incompatible with chapter 3 of the Treaty of Rome and in particular with article 113 which explicitly states that ' . . . the

common commercial policy shall be based on uniform principles, particularly in regard to . . . measures to protect trade such as those to be taken in case of dumping . . . ' (H.C. Debs., vol. 996, Written Answers, col. 312: 17 December 1980.)

Later in the same reply, the Lord Privy Seal remarked:

The powers of the European Community institutions are set out in the treaties to which the United Kingdom acceded under the Treaty of Accession. The reassertion of the power of national Parliaments over the institutions of the Community in such a way as to interfere with the powers conferred by the treaties on those institutions would be incompatible with the obligations we accepted when we ratified the Treaty of Accession. (Ibid.)

In the course of a debate in the House of Lords on the subject of Britain's role in the United Nations, the Government Minister, Lord Trefgarne, stated:

. . . the member states of the Community seek to harmonise their political positions on all the problems that concern them, not merely those that fall within the scope of the treaties. Co-operation at the United Nations has been one of the most successful aspects of this effort. At the last Assembly our delegation in New York joined in more than 300 meetings to harmonise Community attitudes, and a common voting position was achieved on the great majority of the resolutions. The Community has already achieved a cohesion which is widely respected in the UN organisation. (H.L. Debs., vol. 415, col. 1170: 17 December 1980.)

### **Part Three: III. C. *Subjects of international law—the Holy See***

(See Part Three: I. B. 1., above.)

### **Part Three: III. D. *Subjects of international law—other subjects of international law—mandated and trust territories, Namibia***

In the course of a debate in the Trusteeship Council on 29 May 1980 on the subject of the relations between the Trusteeship Council and the General Assembly, the United Kingdom delegate, Miss Harden, stated:

The position of my delegation on this question is also well known. The Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples is of course a Committee of the General Assembly. It was created by General Assembly resolution 1654 (XVI). That resolution requested the Trusteeship Council to assist the Committee in its work. Such assistance was extended in relation to the former non-strategic trust territories. However, now that there are no longer any non-strategic trust territories, the Trusteeship Council reports to the Security Council rather than to the General Assembly.

In these circumstances, my delegation considers that the Trusteeship Council is no longer called upon to assist the Committee of 24. (T/PV. 1503, p. 46.)

In replying to a question on the subject of Namibia's progress to independence, the Government Minister in the House of Lords, Lord Trefgarne, stated:

As for the United Nations, we certainly support everything that they are doing, with one qualification: they have recognized SWAPO to be the sole representative of the Namibian people; we think that that is for the Namibian people to decide for themselves. (H.L. Debs., vol. 404, col. 564: 19 February 1980.)

In the course of his reply to a question about United Kingdom imports of uranium from Namibia, said to be without the consent of the Council of Namibia, the Government Minister, Lord Trefgarne, stated:

We do not recognise the Council of Namibia's claim to be the administering authority of Namibia or to take decisions binding on the international community . . . (H.L. Debs., vol. 408, col. 758: 23 April 1980.)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

Her Majesty's Government, like their predecessors, have not endorsed General Assembly Resolution 2145. They however consider that the South African presence in Namibia is unlawful and should be withdrawn. (H.C. Debs., vol. 985, Written Answers; col. 859: 5 June 1980.)

In reply to a question about constitutional development in Namibia, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

The Five do not recognise the 'National Assembly' in Namibia, as it is based on the unilateral elections of December 1978. The constitutional developments recently announced in Namibia do not alter the international status of the territory, nor South Africa's responsibility under the United Nations plan accepted by all the parties. (H.C. Debs., vol. 986, Written Answers, col. 555: 18 June 1980.)

In reply to questions, the Government Minister in the House of Lords, Lord Trefgarne, stated:

. . . Her Majesty's Government have often stated that they do not accept the description of SWAPO in resolutions of the United Nations General Assembly as the sole and authentic representative of the Namibian people. . . .

. . . our view is that SWAPO cannot claim to be the sole representative of the Namibian people because in due course that will be for the people of Namibia themselves to decide. (H.L. Debs., vol. 413, col. 749: 3 November 1980.)

### **Part Three: III. E. *Subjects of international law—condominium***

(See also Part Four: V., and Part Nine: X., *infra*.)

In moving the second reading in the House of Lords of the New Hebrides Bill, the Government spokesman, Lord Trefgarne, stated:

The essential purpose of this Bill, in the words of the Long Title, is to: ' . . . make provision in connection with the attainment by the New Hebrides of independence within the Commonwealth'.

Before I describe the contents of the Bill, I should like to trace briefly the



history of the New Hebrides and the developments leading up to its introduction. The New Hebrides is unique in its status as a condominium. It is administered jointly by Britain and France under a series of international agreements beginning with the protocol of 1914 which established the condominium. An archipelago of about 70 islands, the New Hebrides is situated in the South Pacific, roughly half-way between Australia and Fiji. The total population is about 120,000 of whom 115,000 are Melanesian in origin. There are long-standing political divisions between the Anglophone, mainly Protestant supporters of the Vanuaaku Party and the Francophone, mainly Roman Catholic supporters of a group of parties which have come to be known as the Moderates.

In July 1977, British and French Ministers announced a joint programme leading to independence for the New Hebrides in 1980. After a number of setbacks, the first major step in this direction was made in December 1978 with the formation of a government of national unity upon which both sides of the political divide were equally represented. By the middle of last year, this new government, assisted by a broadly based constitutional committee, had made considerable progress with the task of drawing up an independence constitution.

A constitutional conference was held in Vila, the capital, in September under the joint chairmanship of my honourable friend, Mr. Blaker, the Minister of State, and his French counterpart, M. Dijoud, the French Secretary of State for Overseas Departments and Territories. The conference agreed a constitution, and it was confirmed that the New Hebrides should achieve independence in 1980. The conference also fixed 14th November, 1979 as the date for fresh elections to the Representative Assembly.

The constitution was formally adopted, and the decision to grant independence in 1980 established by an exchange of Notes between the British and French Governments, to which the independence constitution was annexed. These were laid before Parliament on 29th January as Cmnd. 7808.

The victors in the November elections proved to be the Vanuaaku Party, which formed a new government led by Father Walter Lini. At the first meeting of the newly elected Assembly, Father Lini and his cabinet were empowered by the Assembly to propose a date for independence during the period May to July 1980. The date is expected to be announced shortly. The Council of Ministers has since decided to recommend to the Representative Assembly that the new republic should apply for Commonwealth membership. (H.L. Debs., vol. 404, cols. 1091-2: 4 February 1980.)

In conclusion, Lord Trefgarne stated:

The New Hebrides will, on independence, become a republic with an elected President as Head of State. The new republic will have a unicameral legislature, to be known as Parliament, and a Council of Ministers responsible to it, headed by a Prime Minister. The independence constitution provides, among other things, for the protection of fundamental rights and freedoms of the individual—citizenship, the judicature, and the public service. (Ibid., col. 1093.)

In moving the second reading in the House of Commons of the New Hebrides Bill, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, Mr. Richard Luce, stated:

It is not what might be termed the usual independence Bill since it does not

provide for the actual grant of independence. This is because the New Hebrides is not a British colony: its legal status as an Anglo-French condominium was established by international agreement and must therefore be terminated in the same way. This will be achieved by the Exchange of Notes between the British and French Governments signed in Paris on 23 October 1979, which constitutes a legally binding international agreement and provides for the independence of the New Hebrides during 1980. The exact date of independence will be appointed by Order in Council to be made under this Bill. (H.C. Debs., vol. 980, col. 682: 6 March 1980.)

In making a statement on the subject of the New Hebrides, the Minister of State, Foreign and Commonwealth Office, Mr. Peter Blaker, referred to a meeting he had had with the French Secretary of State for Overseas Departments and Territories, M. Dijoud. He continued:

M. Dijoud and I agreed that we must discharge our joint responsibility to maintain law and order in the territory. We agreed that we must re-emphasise our joint support for the democratically elected Government of the New Hebrides, our commitment to the independence constitution agreed by all parties in Vila last year, and our determination to safeguard the territorial integrity of the condominium. (H.C. Debs., vol. 985, col. 1247: 3 June 1980.)

Later Mr. Blaker stated:

The nature of the condominium is such that it is assumed that the two metropolitan powers will always act together. The basic constitutional document, which is the document of 1914, is silent on the possibility of unilateral action. I believe that it is essential for Britain and France to act together. (Ibid., col. 1250.)

In the course of a debate on the subject of the state of emergency in the New Hebrides, the Secretary of State for Foreign and Commonwealth Affairs, Lord Carrington, remarked of his decision to send a contingent of Royal Marines to the territory:

On 12th June, the French Government decided to withdraw their gendarmes from the New Hebrides, and did so that day. On 15th June, the French Resident Commissioner made a formal protest to the British Resident Commissioner about the despatch of the Royal Marines. In deploying our troops in Vila, we are not only demonstrating our willingness to live up to our obligations, but we are satisfied that we are acting in accordance with the 1914 Protocol which governs the joint administration in the Condominium.

... it remains the intention of Her Majesty's Government to do all in our power to promote a peaceful solution to the problem, to support the democratically elected Government and to safeguard the integrity of the New Hebrides. (H.L. Debs., vol. 410, col. 829: 16 June 1980.)

In reply to a question, the Government Minister in the House of Lords, Lord Trefgarne, stated:

... the New Hebrides became independent on 30th July. They adopted the name of Vanuatu, and became the 44th member of the Commonwealth. On 29th July

the Government of Vanuatu asked both Britain and France to leave our troops in the country for a total of three weeks after independence. We and the French have both acceded to this request. (H.L. Debs., vol. 412, col. 1761: 8 August 1980.)

**Part Three: III. F. *Subjects of international law—other subjects of international law—miscellaneous***

(See also Part Three: I. D. 2, *supra*.)

In the course of its deliberations on the role of the United Kingdom Parliament in relation to the British North America Acts, the Foreign Affairs Committee of the House of Commons addressed a number of questions to the Foreign and Commonwealth Office. One question ran:

Has the United Kingdom any Treaty or other responsibilities to Indians in Canada?

The reply of the Foreign and Commonwealth Office was given in a memorandum dated 11 November 1980 as follows:

No. All relevant Treaty obligations in so far as they still subsisted became the responsibility of the Government of Canada with the attainment of independence, at the latest with the Statute of Westminster 1931. (*Parliamentary Papers*, 1979–80, House of Commons, Paper 362–xxi, p. 63.)

**Part Four: I. *The individual—nationality***

(See also Part Eleven: II. A. 7. (a). (i). (United Kingdom/Sri Lanka Agreement), *infra*.)

During the debate in Committee of the House of Commons on the New Hebrides Bill, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, Mr. Richard Luce, stated:

Clause 1 will make citizens of the New Hebrides Commonwealth citizens in United Kingdom law. This is a normal consequence of a territory becoming independent and joining the Commonwealth.

The Bill does not, unlike the majority of independence Bills, include the usual complex provisions taking away citizenship of the United Kingdom and Colonies from those who become citizens of the new State. This is because the circumstances of the New Hebrides differ radically from those obtaining in the normal case of a territory which is a British colony before its independence. In a colony the vast majority of the population has the status of citizen of United Kingdom and Colonies before independence and the independence Act usually takes away this status from those who become citizens of the new State. This is subject to the usual saving which permits those with close connections with the United Kingdom or a remaining dependency—for example, by birth, descent, naturalisation or registration—to retain their status as citizens of the United Kingdom and Colonies even if they become citizens of the new State. In the New Hebrides, however, only a tiny minority of the population are citizens of the United Kingdom and Colonies. (H.C. Debs., vol. 981, col. 601: 19 March 1980.)

The Secretary of State for the Home Department, Mr. William Whitelaw, made the following statement about the law of nationality:



It has long been recognised that our nationality law is out of date. The previous Government published a Green Paper in 1977. We said in our election manifesto that we would introduce a new British Nationality Act. I have published today a White Paper that contains our proposals for legislation. A Bill will be introduced as soon as parliamentary time permits.

It is widely accepted that we need a new citizenship, confined to those who have close connections with the United Kingdom. We propose that this should be known as British citizenship.

The Green Paper proposed that all those citizens of the United Kingdom and colonies who did not become British citizens should become British overseas citizens. We have, however, been impressed with the argument that a separate citizenship should be established for the dependencies as a whole. We propose that this should be called citizenship of the British dependent territories. I emphasise that the establishment of this separate citizenship will not alter the United Kingdom's obligations and commitments to our overseas territories.

Those who are now citizens of the United Kingdom and colonies but do not qualify either for British citizenship or for citizenship of the British dependent territories will become British overseas citizens.

Children born in the United Kingdom, the Channel Islands or the Isle of Man will normally acquire British citizenship by birth, but we think that in principle there is a good case for providing, with the safeguards contemplated in the White Paper, that a child of parents neither of whom is a British citizen and neither of whom is settled here should not acquire British citizenship solely by his birth in the United Kingdom.

A British citizen by birth, whether male or female, will transmit his or her citizenship to the first generation born abroad, and, normally, to the first generation only. But children born abroad to Crown servants who are British citizens will be citizens by birth, and there will be special provisions for children born abroad to certain other people who have close connections with business and other organisations based in the United Kingdom, or with some international bodies.

All adults, whether Commonwealth citizens or foreigners, who wish to obtain British citizenship will do so by naturalisation. The present automatic entitlement of wives to obtain our citizenship by registration will be ended. Instead, both husbands and wives will be able to apply for naturalisation on the same terms as others, though after three years' residence instead of five.

The present entitlements to acquire citizenship by registration possessed by wives and by Commonwealth citizens who were settled here before 1 January 1973 will be preserved for an interim period of two years. After careful consideration, we have decided not to introduce any restrictions on the holding of dual nationality by those people who come here and acquire British citizenship by naturalisation or registration.

Citizenship of the British dependent territories will be acquired under the same general pattern as that proposed for British citizenship. This citizenship will not give the right of entry to a dependency other than that with which a person is connected.

British overseas citizenship represents, in essence, the relationship with the United Kingdom held by people connected with countries that were once part of the British Empire, or whose ancestral connections with the United Kingdom or

its present dependencies are not sufficiently close to qualify them for British citizenship or citizenship of the British dependent territories. Children born after the Act comes into force to parents who have become British overseas citizens will not themselves hold that citizenship.

I make it clear once again that we shall continue to recognise the special position, for immigration purposes, of certain United Kingdom passport holders, mainly from East Africa, and we shall maintain our undertaking to continue the special voucher scheme for them.

It will no longer be necessary to use the term 'British subject' as the common status of all people connected with the Commonwealth. In the Bill, the only expression denoting the common status of all people connected with the Commonwealth will be 'Commonwealth citizen'.

All those who have citizenship of the United Kingdom and colonies at the time when the Act comes into force will acquire one of the new citizenships. No one who is then a citizen of the United Kingdom and colonies will be left without a citizenship. Generally speaking, those citizens who or whose parents or grandparents were born, adopted, naturalised or registered in the United Kingdom will become British citizens. Those citizens of the United Kingdom and colonies from overseas who have been here for five years and are settled will also become British citizens.

There is a small group of people, formerly stateless, and most of them children, who have become patrial by registration overseas, and who we think ought to be given whichever citizenship their mothers acquire. Apart from these, every citizen of the United Kingdom and colonies who is patrial will become a British citizen, and no one who has the right of abode in this country will lose it. In the long term, only British citizens will have the right of abode. But individual people who are not citizens of the United Kingdom and colonies but now have the right of abode will retain it. The Bill will not adversely affect the position under the immigration law of anyone who is lawfully settled in the United Kingdom, whether or not he becomes a British citizen. Nor will it affect our commitment to admit the wives and dependent children of men lawfully settled here.

When the Act comes into force there will be some applications for citizenship still outstanding. The Bill will provide that an application for citizenship that has been properly made and is still under consideration at the time when changes in the law come into effect should be dealt with according to the law at the time when it was made, though if citizenship is granted it will, of course, be whichever of the new ones is appropriate. (H.C. Debs., vol. 989, cols. 1516-18: 30 July 1980.)

The Secretary of State, replying to questions then put to him, remarked:

I am given to understand that EEC law mainly concerns freedom of movement, not citizenship, and therefore there is no conflict with our proposals.

The position of Pakistan is the same as for other foreign countries now.

British women will have equal rights for the first time. They will be able to obtain nationality by naturalisation. The position regarding the immigration rules is separate from the Nationality Act, but I made clear at the time they were changed that if the Bill were passed we should consider the implications for British women.

On the question of people being left without citizenship, British overseas

citizenship will provide certain protection, and I do not think that it should be undervalued. There will be British consular protection for British overseas citizens, and, at the same time, many of the people concerned will acquire the citizenship of the country in which they were born or of the country in which their mothers were born. That should meet the point raised by the right hon. Gentleman, but it can be carefully considered.

We changed to three citizenships instead of two because it was the wish of some of the dependencies concerned. We felt, after discussion with them, that this was a reasonable change.

The proposal about certain citizens of Eire being British subjects is limited. It is confined to people who were British subjects before 1949. The proposal does not affect civic rights, or the right to vote. The right of citizens of Eire to vote was given in the Representation of the People Act 1949, and if there is to be any change, that Act will have to be amended. (Ibid., cols. 1521-2.)

#### **Part Four: V. *The individual in international law—statelessness, refugees***

In reply to the question whether refugees in the countries of the E.E.C. have the same rights of movement and of employment in those countries as E.E.C. citizens, the Parliamentary Under-Secretary of State, Home Department, wrote:

No. The free movement rights of the Treaty of Rome apply only to nationals of Member States and to members of their family. (H.L. Debs., vol. 404, col. 1489: 6 February 1980.)

In the course of the debate on the second reading in the House of Commons of the New Hebrides Bill, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, Mr. Richard Luce, stated:

There is an indigenous New Hebridean population which consists of 112,000 of the total of 120,000 people living there. At present they are technically Stateless, although they carry special travel documents when travelling abroad, enabling them to call on the British and French authorities for protection if that is necessary. Under the independence constitution they will acquire New Hebridean citizenship on independence. (H.C. Debs., vol. 980, col. 709: 6 March 1980.)

In reply to the question what were the differences in rights and obligations between United Kingdom citizens and persons accepted for settlement, the Minister of State, Home Department, wrote:

A person is settled in the United Kingdom if he is ordinarily resident here without being subject under the immigration laws to any restriction on the period for which he may remain. The main difference from the immigration point of view between citizens of the United Kingdom and Colonies who have the right of abode in the United Kingdom and persons accepted for settlement is that the former are exempt from control under the Immigration Act 1971 while the latter remain subject to control and with certain exceptions are liable to deportation. The civic rights and obligations of British subjects extend to all Commonwealth citizens irrespective of their status under the immigration law. A person is not eligible for citizenship solely by reason of being a dependant of someone who is



accepted for settlement, though he may in due course be able to acquire citizenship by registration or naturalisation when he can satisfy the qualifications laid down in the British Nationality Acts. (H.C. Debs., vol. 987, Written Answers, col. 575: 2 July 1980.)

In reply to the question what was the Government's policy towards the admission into the United Kingdom of refugees whose lives are in grave danger for political reasons, the Secretary of State for the Home Office wrote:

Applicants in the United Kingdom are considered in accordance with the immigration rules and the United Nations Convention and Protocol relating to the Status of Refugees. Applicants abroad may be accepted if they have ties with this country or under the special programme for Vietnamese refugees. (H.C. Debs., vol. 996, Written Answers, cols. 359-60: 18 December 1980.)

**Part Four: VI. *The individual in international law—immigration and emigration, extradition, expulsion and asylum***

In reply to the question whether a settlement had been reached to compensate 434 families evacuated from Diego Garcia and other islands in the Chagos Archipelago, the Government Minister, Lord Trefgarne, stated:

... in 1973 Her Majesty's Government, in agreement with the Mauritian Government, paid £650,000 for resettlement of the families in Mauritius. A further 'without prejudice' offer of £1.25 million as compensation for displacement is now being considered by the community. (H.L. Debs., vol. 404, col. 987: 31 January 1980; see also H.C. Debs., vol. 978, cols. 1511-13: 13 February 1980.)

In reply to questions on the above matter, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

The former population of the islands was largely composed of migrant plantation workers. The plantations have now been closed and Her Majesty's Government have made them an offer of £1.25 million as compensation for displacement in exchange for an undertaking that they will not return to the Chagos Archipelago.

... In November 1979, Her Majesty's Government made an offer of £1.25 million which we understand is still under consideration. Acceptance of the offer requires principally an acknowledgement that it is in full and final settlement of all claims on the British Government and the abandonment of any claim to return to the Chagos Archipelago. (H.C. Debs., vol. 981, Written Answers, cols. 540-1: 25 March 1980.)

In reply to the question

what effect the agreement concerning the application of the European Convention on the Suppression of Terrorism among member States of the European Community has on the existing arrangements for extradition between the United Kingdom and the Republic of Ireland; and what consequential changes, if any, will be needed in United Kingdom law

the Minister of State, Home Department, wrote:

The agreement has been signed by all the present member States of the European Communities but not, as yet, ratified by any. It can enter into force only when it is ratified by all nine States. The Suppression of Terrorism Act 1978 confers power to make orders that would enable the United Kingdom to discharge the agreement's obligations.

If the agreement entered into force, and on the assumption that the Republic of Ireland made the declaration allowed by article 3·3, the main effects on the arrangements for the return of fugitives from the United Kingdom to the Republic and vice versa would be as follows.

Within the United Kingdom, a request for the return to the Republic of Ireland of a person accused or convicted of an offence described in articles 1 or 2 of the European Convention on the Suppression of Terrorism could not be refused on the ground that the offence was of a political character. Within the Republic, any case in respect of which a request for the return to the United Kingdom of a person accused or convicted of an offence described in article 1 of the Convention were refused on the ground that the offence was of a political character would have to be submitted to the Republic's prosecuting authorities. (H.C. Debs., vol. 990, Written Answers, cols. 27-8: 4 August 1980.)

In reply to a question, the Minister of State, Home Department, wrote:

The criteria for the grant of asylum are set out in the immigration rules, which refer to the United Nations Convention Relating to the Status of Refugees. Broadly, the test is whether an applicant here has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion if he returns to his own country. (H.C. Debs., vol. 995, Written Answers, col. 236: 3 December 1980.)

#### **Part Four: VII.** *The individual—protection of human rights and fundamental freedoms*

(See also Part Six: II. A., *infra*.)

In the course of a debate on the subject of freedom of worship in Eastern Europe, in which the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights were mentioned, the Minister of State, Foreign and Commonwealth Office, Mr. Peter Blaker, remarked:

... there can be no doubt that repression has been most blatant in the Soviet Union, whilst discrimination and harassment has been more marked in Czechoslovakia than in most other countries of Eastern Europe. In both these countries such persecution and discrimination is clearly a violation of the right of religious belief expressly laid down in their constitutions and in other international agreements to which my hon. Friend referred.

Principle VII of the Helsinki Final Act clearly states that signatory States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief for all, without distinction as to race, sex, language or religion. It goes on to state that: 'the participating states will recognise

and respect the freedom of the individual to profess and practise, alone or in community with others, religion or belief acting in accordance with the dictates of his own conscience'. Against the background of these very explicit undertakings in respect of freedom of religion, the countries concerned cannot possibly claim that their action is in any way consistent with their signature of the Final Act. (H.C. Debs., vol. 982, col. 386: 1 April 1980.)

Later in his speech, Mr. Blaker stated:

. . . we shall continue, in the run up to November's Madrid review conference, to press the Soviet Union and Eastern European Governments to implement fully the Helsinki Final Act, including its human rights provisions, through statements such as our regular reports to the House and at Madrid in the review of implementation, which will be an essential aspect of that meeting. (Ibid., col. 388.)

In reply to a question about the Declaration of the Rights of the Child, adopted by the General Assembly of the United Nations, the Government Minister, Lord Trefgarne, stated:

The Declaration of the Rights of the Child is not a binding legal instrument, but exhortatory. The question of violation does not therefore arise. (H.L. Debs., vol. 408, col. 1007: 28 April 1980.)

In reply to a question concerning the application of the Genocide Convention to activities by the Palestine Liberation Organization in Lebanon against inhabitants of Israel, the Secretary of State for Foreign and Commonwealth Affairs, Lord Carrington, stated:

The Government deplore all acts of terrorism but the Genocide Convention does not cover terrorist attacks against Israel such as those to which the noble Lord refers.

. . . the convention on the crime of genocide was adopted by the General Assembly on 9th December 1948. It was aimed not at individual acts of terrorism but to cope with the question of genocide in the aftermath of the Second World War. (H.L. Debs., vol. 409, col. 1417: 4 June 1980.)

In reply to the question whether Her Majesty's Government intended to ensure that human rights in general, and particularly in the Soviet Union, were on the agenda for the Madrid conference, the Minister of State, Foreign and Commonwealth Office, wrote:

The first priority of the Madrid meeting will be to review the implementation of all aspects of the Helsinki Final Act and particular attention will be given to those of its provisions which have been most blatantly disregarded. The failure of the Soviet Union and certain other Governments to respect human rights and fundamental freedoms will figure prominently in this review. (H.C. Debs., vol. 986, Written Answers, col. 629: 19 June 1980.)

In reply to a question on the subject of the implementation by the Soviet Union and Eastern European countries of the Helsinki Final Act, the Minister of State, Foreign and Commonwealth Office, gave a report from which the following passage is extracted:



FURTHER REPORT ON SOVIET AND EASTERN EUROPEAN IMPLEMENTATION OF THE HELSINKI FINAL ACT FOR THE PERIOD DECEMBER 1979 TO JUNE 1980

... More or less coinciding with their aggressive action in Afghanistan, the Soviet authorities have similarly shocked world public opinion with an intensified campaign against political dissenters within their own borders, of which the banishment to Gorky of Academician Sakharov has been only one of the more widely publicised instances. Such actions are clearly intended to silence protest against Soviet infringements of human rights, and in particular of the Helsinki Final Act, and appear to have been timed partly with the opening of the Olympic Games in mind—and possibly also the approach to the Madrid meeting. The denial of certain basic human rights and of the freedom of the individual to monitor the implementation by Governments of the Helsinki Final Act has continued in a number of other countries in Eastern Europe, notably Czechoslovakia. (H.C. Debs., Vol. 987, Written Answers, col. 621: 2 July 1980.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, Mr. Peter Blaker, stated:

... I have called in the Soviet Ambassador to protest at the harassment and intimidation of a number of British visitors to the Soviet Union, in breach of the Helsinki agreement. ...

I understand that the Soviet Embassy in this country has refused to grant visas to people who do not hold British passports. That appears to us to be another example of a breach by the Soviet Union of its obligations. (H.C. Debs., vol. 988, cols. 1471–2: 16 July 1980.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The United Kingdom is deeply concerned about the practice of torture in various countries throughout the world. Her Majesty's Government are taking an active part in drafting an international convention on torture by participating in the United Nations working group on the draft convention against torture and other forms of cruel, inhuman or degrading treatment or punishment. We aim to achieve a practical and clearly defined convention which can then be signed and ratified by as many States of the United Nations as possible. (H.C. Debs., vol. 988, Written Answers, col. 567: 16 July 1980.)

In reply to the question whether, in the context of the provisions of the Helsinki agreement relating to the improvement of working conditions of journalists, the Government would protest at the withdrawal of the visa of the foreign editor of the *Jewish Chronicle*, Mr. Joseph Finklestine, to visit Moscow during the Olympic Games, the Lord Privy Seal wrote:

Yes. The Government will protest. (H.C. Debs., vol. 989, Written Answers, col. 666: 29 July 1980.)

In reply to a question about the United Nations Convention on the Elimination of Discrimination against Women, the Minister of State, Foreign and Commonwealth Office, wrote:

Her Majesty's Government are studying this convention with a view to signature

and ratification, with as few reservations as may prove necessary. We are still identifying possible areas of difficulty in relation to present practices, for example, the convention's applicability to the Armed Forces and its compatibility with existing legislation and practices on nationality and immigration. (H.C. Debs., vol. 989, Written Answers, col. 809: 31 July 1980.)

In a reply to a question about the Government's attitude towards the United Nations Convention on the Elimination of Discrimination against Women, the Government Minister wrote:

We have not yet signed this convention, but are examining the text in the hope that we may be able to do so. Among other considerations, we must take account of United Kingdom provisions on nationality, on which new legislation is to be introduced. We must also allow time to complete consultations with Dependent Territories, the Channel Islands and the Isle of Man. (H.L. Debs., vol. 413, col. 2038: 22 October 1980.)

In reply to a question, the Parliamentary Under-Secretary of State, Home Department, Lord Belstead, stated:

Her Majesty's Government have decided that our acceptance of the jurisdiction of the European Court of Human Rights, and the right of individual petition to the European Commission of Human Rights, will be renewed for a period of five years from January 1981. The appropriate declarations will be communicated to the Secretary-General of the Council of Europe shortly. (H.L. Debs., vol. 415, col. 18: 25 November 1980.)

In reply to a question on the subject of the Soviet refusal to allow Dr. Victor Brailovsky to emigrate, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

The British delegation to the CSCE review conference has already raised the case of Dr. Brailovsky in the context of the debate on the provision of the Helsinki Final Act concerning the right of individuals to the freedom of travel and emigration. (H.C. Debs., vol. 994, Written Answers, col. 133: 26 November 1980.)

In the course of the second reading debate in the House of Lords on the Bill of Rights Bill, the Lord Advocate, Lord Mackay of Clashfern, stated:

To try to summarise the advantages, it might be fair to describe them as: first, a positive and public declaration of rights, especially valuable at a time when there is concern among many people about the growth in the power of the state, and these fears have been expressed by some of your Lordships; secondly, a possible improvement in the actual rights of individuals; thirdly, British litigants would be able to seek a remedy from British judges in British courts instead of having to go to the European Commission and Court at Strasbourg; and fourthly, we would be bringing our practices more into line with our European neighbours in the Council of Europe, which is important when we are growing closer and closer to our colleagues in the European Community.

The main arguments against can perhaps be summed up even more briefly as; first, introducing a substantial and wide-ranging element of uncertainty into our

law; secondly, the transfer from Parliament to the judiciary of decisions involving the interpretation or balancing of conflicting rights; thirdly, a fundamental change in the task and burden of the courts; and, fourthly, we could still find that decisions made in Britain were overruled at Strasbourg, and the embarrassment of that could continue.

The present situation is that the Government have not yet reached a conclusion upon whether this particular Bill of Rights is the appropriate way forward in the field of human rights. (H.L. Debs., vol. 415, cols. 557-8: 4 December 1980.)

Later in his speech the Lord Advocate remarked:

. . . perhaps I should make it clear that Her Majesty's Government have no intention whatever of withdrawing from the existing Convention on Human Rights, with the jurisdiction of the Commission and the European Court of Human Rights. Indeed, I do not think I understood anyone who has taken part in the debate in your Lordships' House so far to suggest that. The only question is whether some additional remedy should be available under a Bill such as this, incorporating the convention in our law and giving a domestic remedy, not in substitution for but in addition to, the remedies which presently exist under the Strasbourg Convention.

. . . I have never understood this Bill of Rights to be in substitution for our accession to, and ratification of, the Strasbourg Convention. I think that in that Her Majesty's Government are at one with our predecessors. The Government have been fully committed to complying with the requirements of the 1950 Convention, subject to the derogations that have been entered to it and our one reservation. (Ibid., cols. 558-9.)

In the course of a debate in the House of Lords on the subject of Britain's role in the United Nations, the Government Minister, Lord Trefgarne, stated:

Another welcome development in the United Nations is the growing acceptance that, despite the provision of the Charter which rules out interference by the organisation in the internal affairs of states, human rights questions are the legitimate concern of all members. (H.L. Debs., vol. 415, col. 1170: 17 December 1980.)

#### **Part Five: IV. *Organs of the State—diplomatic agents and missions***

(See also Part Three: II. A. 2. (d)., *supra*.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, Mr. Nicholas Ridley, stated:

Over recent months we have been considering all aspects of our relations with Chile. We have now decided that we should restore our relations with Chile to the normal diplomatic level, in line with those of most of our major allies.

. . . we are, therefore, after discussion with the Chilean Government, reinstating ambassadors. (H.C. Debs., vol. 976, col. 1872: 17 January 1980.)

In the course of answering questions on United Kingdom diplomatic



representation in Albania, the Government representative in the House of Lords, Lord Trefgarne, stated:

successive British Governments have made clear that they would be glad to find a way round the obstacles which have so far prevented a resumption of relations.

... I would agree ... that representation at full ambassadorial level might not be appropriate in this case; but I should say that the Albanians have still not paid the compensation awarded to Britain by the International Court of Justice in 1949 in respect of the Corfu Channel incident. (H.L. Debs., vol. 404, col. 840: 30 January 1980; see also vol. 410, col. 958: 16 June 1980.)

In reply to a question about the recovery of arrears of rates upon two premises in London used by the Iraqi Embassy and the Uganda High Commission respectively, the Lord Privy Seal wrote:

The arrears of rates on the premises at Consort Lodge, NW8 have only just been brought to our attention. I understand that the property consists of several flats, some of which are apparently empty. None of them has been accepted by Her Majesty's Government as premises of a diplomatic mission. We are now making inquiries into this matter to see whether there are any ways in which we can assist the council.

The arrears of rates on 58-59 Trafalgar Square, which arose largely from the period 1977-79 when diplomatic relations with Uganda had been broken, have been brought to the attention of the Ugandan High Commission at a recent meeting. The High Commission has been urged to make payment to the City of Westminster as soon as possible. (H.C. Debs., vol. 977, Written Answers, col. 647: 30 January 1980.)

In the course of a debate in the House of Lords on the subject of Afghanistan, the Government spokesman, Lord Trefgarne, stated:

The American hostages are still being held. I cannot re-emphasise too strongly how intolerable we find this continuing flagrant disregard for all the norms of international law. (H.L. Debs., vol. 404, col. 1486: 6 February 1980.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote that the United Kingdom maintained no diplomatic representation in Lithuania, Latvia and Estonia. (H.C. Debs., vol. 979, Written Answers, col. 751: 29 February 1980.)

In reply to the question whether school premises purchased in London by the Libyan Embassy would be given diplomatic immunity, the Parliamentary Under-Secretary of State, Department of the Environment, Lord Bellwin, stated:

The answer is, no, they would not. We do not regard schools as the premises of a diplomatic mission. (H.L. Debs., vol. 407, col. 607: 25 March 1980.)

In reply to a question about instructions given to embassy staffs in general, and those in Saudi Arabia in particular, concerning the use of alcoholic beverages, the Minister of State, Foreign and Commonwealth Office, wrote in part:

In accordance with the Vienna convention on diplomatic relations, all British Embassy staff in Saudi Arabia as in countries elsewhere are expected to observe the laws and regulations of the countries to which they are sent. (H.C. Debs., vol. 982, Written Answers, col. 309: 3 April 1980.)

In the course of a statement on the subject of the American hostages in Iran, the Prime Minister, Mrs. Margaret Thatcher, remarked:

The illegal act by Iran is now in its sixth month. . . . The United States Administration have put up with the flouting of international law and established diplomatic practice by Iran for several months in the hope of securing the release of the hostages. (H.C. Debs., vol. 982, col. 790: 14 April 1980.)

In the course of a debate in the House of Lords on the subject of the American hostages in Iran, the Secretary of State for Foreign and Commonwealth Affairs, Lord Carrington, stated:

. . . the treatment of the hostages is . . . totally illegal and against international law. (H.L. Debs., vol. 408, col. 30: 14 April 1980.)

In the course of a debate on the subject of Iran, the Minister of State, Foreign and Commonwealth Office, Mr. Douglas Hurd, stated:

. . . it is necessary . . . to show emphatically to the Iranians that their position as a major country in the Middle East, and as a major member of the international community, depends on compliance with this basic point of international law—that diplomats should be accorded the protection that international law guarantees. (H.C. Debs., vol. 983, col. 470: 23 April 1980.)

At their meeting on 22 April 1980, the Foreign Ministers of the nine member States of the E.E.C., including the United Kingdom, issued a decision on Iran which read in part:

The Iranian Government continues to ignore the clear call of the UN Security Council and the International Court of Justice to bring to an end a flagrant violation of international law and release the hostages.

. . . Since the hostages were first detained, the Nine, in full respect of the independence of Iran and the right of the Iranian people to determine their own future, have insisted that they must be released. The fact that after six months they are still detained, despite the efforts of the Nine and the clear condemnation by the community of nations, is intolerable from a humanitarian and legal point of view. (H.L. Debs., vol. 408, col. 770: 23 April 1980.)

In reply to the question with which countries Her Majesty's Government does not have diplomatic relations, the Minister of State, Foreign and Commonwealth Office, wrote:

Her Majesty's Government do not have diplomatic relations with the following States: Albania, Cambodia and Guatemala. Guatemala broke off relations with the United Kingdom. As for Cambodia the situation remains as set out in my right hon. Friend's speech of 6 December 1979.—[Vol. 975, c. 723.]—The Albanian Government have not so far been prepared to discuss the resumption of relations

before a resolution of the long-standing problem of the gold formerly belonging to the pre-War Bank of Albania. (H.C. Debs., vol. 984, Written Answers, col. 179: 23 April 1980.)

In the course of a debate on the subject of the American hostages in Iran, the Lord Privy Seal, Sir Ian Gilmour, referring to the Security Council resolution of January 1980 calling for sanctions against Iran, stated:

It is most unfortunate that the Soviet Union vetoed the United Nations resolution last January. If it had not done that, the problem would probably have been solved long since. It is entirely wrong that the Soviet Union should not have done everything in its power to bring this great breach of international law to an end. (H.C. Debs., vol. 984, col. 879: 25 April 1980.)

In the course of a statement about the meeting of the European Council held on 27 and 28 April 1980, the Secretary of State for Foreign and Commonwealth Affairs, Lord Carrington, remarked:

We reaffirmed the absolute necessity for every government in the world, whatever its political attitude, to respect the Charter of the United Nations and the principles of international law. This requires . . . in Iran that the American hostages should be released without further delay. (H.L. Debs., vol. 408, col. 1149: 29 April 1980.)

In reply to the question whether the surviving intruder from the siege of the Iranian Embassy in London was to be repatriated to Iran or tried in the courts in England, the Secretary of State for the Home Department, Mr. William Whitelaw, stated:

I understand, on advice, that he is to be subject to the due process of law in this country. (H.C. Debs., vol. 984, col. 35: 6 May 1980.)

In reply to the question which countries afford to United Kingdom diplomats the provision of free medical treatment and education, the Minister of State, Foreign and Commonwealth Office, wrote in part:

Under the terms of the relevant social security conventions, diplomatic service staff are eligible for free medical treatment in Bulgaria and Romania: and for limited free treatment in European Community countries and in Austria, Czechoslovakia, the German Democratic Republic, Hungary, New Zealand, Poland, Sweden, the U.S.S.R. and Yugoslavia. The terms of the conventions with Finland, Norway, Portugal, Spain and Turkey exclude diplomatic service staff, who are therefore not entitled to free treatment in these countries, or in other countries with which the United Kingdom has no Convention.

I do not have full information about which countries provide free education for members of the diplomatic service. Eligibility depends on local practice and legislation rather than on inter-Governmental agreements. (H.C. Debs., vol. 984, Written Answers, col. 29: 6 May 1980.)

In reply to the question whether free medical treatment and education are made available to foreign diplomats resident in the United Kingdom, the Minister wrote:



Foreign diplomats who are in post in the United Kingdom are eligible for National Health Service facilities on the same basis as other people ordinarily resident in this country. This also applies to members of their families who accompany them, but it does not extend to any dependants who might come to the United Kingdom specifically for treatment or to staff who might be posted to the United Kingdom for the same purpose.

If a foreign diplomat wishes his child to attend a maintained school—at which no fees are chargeable—this would normally be possible: but for higher and further education establishments tuition fees must be paid. (*Ibid.*)

In reply to the question what action had been taken within the United Nations by Her Majesty's Government in respect of the American hostages in Iran, the Government Minister in the House of Lords wrote:

My Lords, we joined in the Security Council resolution adopted unanimously on 4th December, which condemned the seizure of the hostages. We voted for the later sanctions resolution on Iran of 10th January which was vetoed by the Soviet Union. We fully supported the last United Nations initiative: namely, the five-man commission of lawyers which visited Tehran from 23rd February to 10th March, but whose efforts to find a solution were sadly thwarted. At the European Council meeting in Luxembourg on 28th April, which my noble friend the Foreign and Commonwealth Secretary attended with the Prime Minister, we assured the Secretary-General of the United Nations of our full support for his continuing efforts to find a political solution. (*H.L. Debs.*, vol. 408, col. 1764: 8 May 1980.)

In reply to a question about the status of the staff at present in the Libyan Embassy in London, the Minister of State, Foreign and Commonwealth Office, wrote:

The legal position is confused because of the unprecedented attempt by the Libyan Government to transform their embassy into a People's Bureau. Certain members of the People's Bureau appear to retain diplomatic status by virtue of their appointment before the formation of the People's Bureau. Other members do not claim diplomatic status. (*H.C. Debs.*, vol. 984, Written Answers, col. 279: 9 May 1980.)

In reply to the question whether the law and practice on diplomatic immunity would be revised in the light of the siege at the Iranian Embassy and other violent incidents involving foreign embassies in the United Kingdom, the Minister of State, Foreign and Commonwealth Office, wrote:

We deal with any abuses of the Vienna convention on a case by case basis. I do not believe that a review of the law and practice relating to diplomats is necessary since the provisions of the Vienna convention permit us to take appropriate action should abuses rise. This we shall continue to do. (*H.C. Debs.*, vol. 984, Written Answers, col. 279: 9 May 1980.)

In the course of a debate on the subject of Anglo-Libyan relations, the

Minister of State, Foreign and Commonwealth Office, Mr. Douglas Hurd, stated:

One complication has been the status of the Libyan People's Bureau, which has taken over the functions of the Libyan embassy. It is not for us to say how the Libyans should organise their mission, but it must be established that the People's Bureau will be fulfilling the functions of a diplomatic mission under the Vienna convention on diplomatic relations. We are holding discussions with the Libyan authorities which, we hope, will resolve this question. (H.C. Debs., vol. 984, col. 846: 12 May 1980.)

Later in the same debate, the Minister remarked:

In a further reinforced circular to the Diplomatic Corps, we have recently made clear that we shall take seriously any hard evidence that any mission is using the bag to import weapons covertly, or that any mission is handing them to untitled persons. The Vienna convention is a fairly modern instrument, and it is quite specific on these issues. If it were properly observed, many of these problems would not arise. Our concern is not, therefore, so much to change the convention as to make sure that its terms are observed. (Ibid., cols. 848-9.)

In moving the second reading in the House of Commons of the Iran (Temporary Powers) Bill, the Minister of State, Foreign and Commonwealth Office, Mr. Douglas Hurd, stated:

On 15 December, the International Court of Justice made an interim decision, which I understand is binding under international law, ordering the release of the hostages. That underlines that this is not just a quarrel between the United States and Iran in which the rest of us are essentially spectators. What has happened in Tehran has been, as the International Court of Justice underlined, an affront to a part of international law in which all our interests are involved. (H.C. Debs., vol. 984, col. 913: 12 May 1980.)

Later in the same debate, the Minister for Trade, Mr. Cecil Parkinson, remarked:

... in seizing the American embassy and the hostages, the Iranian Government have breached the Vienna convention on diplomatic relations, and far from protecting the United States diplomats on their territory, as they were bound to do, they have connived at their seizure and their subsequent detention. (Ibid., col. 1002.)

In answer to the question what effect sanctions against Iran would have on speeding up the release of the American hostages in that country, the Minister of State, Foreign and Commonwealth Office, wrote:

If it is decided to impose economic sanctions in the absence of decisive progress towards the release of the hostages, they will be designed to indicate to all concerned in Iran that they cannot expect to enjoy prosperity in co-operation with the West if they persist in this breach of international law. (H.C. Debs., vol. 984, Written Answers, cols. 498-9: 14 May 1980.)

In the course of moving the second reading in the House of Lords of the Iran (Temporary Powers) Bill, the Lord President of the Council, Lord Soames, stated:

The purpose of the economic sanctions which we and the Nine have announced is to show the Iranian authorities and people that they cannot expect reasonable and fruitful relations with the West while they continue to show, by the holding of United States diplomats, the most flagrant disrespect for their fundamental international obligations. (H.L. Debs., vol. 409, col. 376: 15 May 1980.)

Later in the debate on the same matter, the Government Minister in the House of Lords, Lord Trefgarne, remarked:

. . . in November last year a group of terrorists—for they are no other—calling themselves students invaded the Embassy of the United States, seized or destroyed documents and other property and then took a number of diplomats hostage. Today, more than six months later, the Embassy remains in unlawful hands and most of all the hostages are still incarcerated. Of course the worst aspect is the position of the Iranian Government, who have at least acquiesced in these flagrant breaches of international law. (Ibid., col. 408.)

The long title of the Iran (Temporary Powers) Act 1980, which came into force on 17 May 1980, reads:

An Act to enable provision to be made in consequence of breaches of international law by Iran in connection with or arising out of the detention of members of the embassy of the United States of America.

By s. 2 (5) of the Act it extends to the Channel Islands, the Isle of Man and any colony and (to the extent of Her Majestys jurisdiction therein) to any foreign country or territory in which for the time being Her Majesty has jurisdiction.

During a debate on the subject of the attitude towards Iran taken by the Foreign Ministers of the nine member States of the European Community, the Lord Privy Seal incorporated into his speech a declaration made by the Foreign Ministers in Naples on 17–18 May 1980. This read in part:

DECLARATION BY THE FOREIGN MINISTERS OF THE NINE CONCERNING IRAN.

1. At their meeting in Naples on 17 and 18 May 1980, the Foreign Ministers of the Nine Member States of the European Community reconsidered, in accordance with their declaration of 22 April, the situation resulting from the detention of the American hostages in Iran, which constitutes a flagrant violation of international law. (H.C. Debs., vol. 985, Written Answers, cols. 43–4: 19 May 1980.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, Mr. Peter Blaker, wrote:

In taking sanctions we wish to demonstrate to Iran that it cannot expect to enjoy



fruitful relations with the West while it continues to flout the basic principles of international law. (H.C. Debs., vol. 985, Written Answers, col. 347: 22 May 1980.)

In the course of a debate on the subject of diplomatic immunity, the Minister of State, Foreign and Commonwealth Office, Mr. Douglas Hurd, made the following remarks:

... we have power to declare diplomats *persona non grata*. That power exists under international law and we shall not hesitate to use it when we think the circumstances justify it.

Diplomatic missions here have been reminded of these facts several times, most recently last month, and they have been told again that no firearms certificate—this is an important point—will be granted by the police in respect of weapons intended for purposes of protection. That is to say a certificate will not be granted simply on the ground that the person owning the weapon wishes to use it to protect himself. We regard it—this is sustained by international law—as the duty of our authorities in the United Kingdom—the police—to protect diplomatic missions. I think that we gave evidence of our determination of this fact in the siege at Princes Gate. (H.C. Debs., vol. 985, cols. 1216–20: 2 June 1980.)

In reply to a question about the payment of compensation by Iran for damage to the British Embassy in Teheran, the Minister of State, Foreign and Commonwealth Office, wrote:

The Iranian authorities are fully aware of the liability of host Governments under international law to protect diplomatic premises on their territory. They acknowledged responsibility in respect of damage to the British Embassy in Teheran. There has been no suggestion that compensation would not be paid. (H.C. Debs., vol. 985, Written Answers, col. 584: 2 June 1980.)

In the course of a statement issued on 22 June 1980 in Venice by the Seven Nation Summit meeting (including the United Kingdom), it was observed:

The Heads of State and Government vigorously condemn the taking of hostages and the seizure of diplomatic and consular premises and personnel in contravention of the basic norms of international law and practice. (Text provided by the Foreign and Commonwealth Office.)

In reply to a question, the Lord Privy Seal wrote:

The status of those persons working at the People's Bureau of the Socialist People's Libyan Arab Jamahiriya, who have been notified to the Foreign and Commonwealth Office in accordance with the Vienna convention on diplomatic relations as members of the diplomatic or of the administrative and technical staff of the mission, is governed by the relevant provisions of that convention. Other persons working at the People's Bureau are not regarded as having any special status. (H.C. Debs., vol. 988, Written Answers, cols. 567–8: 16 July 1980.)

In reply to the question whether the Chancellor of the Exchequer was

prepared to pay off or make a contribution to the outstanding rates for Rhodesia House which arose during the illegal regime in Rhodesia, the Financial Secretary to the Treasury wrote:

No. The Government made payments in respect of Rhodesia House up to July 1969 when diplomatic privileges were finally withdrawn from the Salisbury regime on the basis, in accordance with the Diplomatic Privileges Act 1964, that Rhodesia House was no longer the premises of a diplomatic mission. Rates on Rhodesia House after July 1969 are now a matter for the city of Westminster and the Government of Zimbabwe. (H.C. Debs., vol. 989, Written Answers, col. 245: 23 July 1980.)

In reply to the question whether diplomatic status was given to South African diplomats seconded from the South African national intelligence service, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

All Governments of States with which we maintain diplomatic relations are entitled, subject to the provisions of the Vienna Convention on Diplomatic Relations, 1961, to 'freely appoint' the members of staff of their embassies in London without notifying Her Majesty's Government of their departmental origins. Her Majesty's Government accord the normal diplomatic privileges and immunities to any persons so appointed. (H.C. Debs., vol. 991, Written Answers, col. 435: 3 November 1980.)

In reply to a question, the Lord Privy Seal wrote:

The persons who enjoy diplomatic immunity from criminal jurisdiction are diplomatic agents, members of the administrative and technical staff of diplomatic missions, certain senior officers of the Commonwealth Secretariat and the heads of certain international organisations. The numbers are:

1980	...	...	...	...	...	4,938
1978	...	...	...	...	...	5,139
1976	...	...	...	...	...	4,657
1974	...	...	...	...	...	4,728

The families of the above also have immunity. Their numbers are not readily available but are currently estimated as 14,800. (H.C. Debs., vol. 991, Written Answers, col. 435: 3 November 1980.)

In the course of Her Speech from the Throne upon the opening of Parliament, Her Majesty the Queen stated:

[My Government] will continue . . . to support the United States Government in their efforts to find an early and peaceful solution to the prolonged illegal detention of the United States' diplomatic hostages in Iran. (H.C. Debs., vol. 994, col. 5: 20 November 1980.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

Under the Vienna convention on diplomatic relations the Government of the Irish Republic have a responsibility to take all appropriate steps to prevent any attack on the British Embassy in Dublin and its personnel. The Government of the Irish Republic accept this responsibility and meet the cost of their protective measures. (H.C. Debs., vol. 996, Written Answers, col. 514: 19 December 1980.)

The following document is an illustration of a certificate provided by the Foreign and Commonwealth Office. Certificates in similar form are also issued under s. 11 of the Consular Relations Act 1968.

DIPLOMATIC PRIVILEGES ACT 1964

CERTIFICATE

Under the authority of Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs conferred on me in accordance with the provisions of Section 4 of the Diplomatic Privileges Act 1964, I, ———, Head of Protocol and Conference Department of the Foreign and Commonwealth Office, hereby certify that the appointment of ——— as ——— at the Embassy of ——— with effect from ——— was notified to the Secretary of State on ——— and he continues to be received in that capacity.

FOREIGN AND COMMONWEALTH OFFICE

[Text provided by the Foreign and Commonwealth Office.]

**Part Five: V. *Organs of the State—consular agents and consulates***

In moving the second reading of the Consular Fees Bill in the House of Lords, the Government Minister, Lord Trefgarne, stated in part:

The Bill is designed to enable any official who is authorised by the Secretary of State to perform a consular function abroad or a corresponding function in the United Kingdom, to levy the fee already pertaining to that function. The rationale of this may appear so self-evident as to cause your Lordships to wonder why it is that, nearly 90 years after the passing of the Consular Salaries and Fees Act of 1891, which introduced the general right to levy consular fees, this principle has not yet been enshrined in law. Your Lordships may also be surprised to learn that the authority to levy the fee for such services performed in foreign countries resides in the title of the functionary rather than in the service he performs, and that at home the authority does not extend to Northern Ireland.

Originally, only consular officers (as narrowly defined in the 1891 Act) were empowered to charge consular fees. After the First World War, however, a growing need developed for certain consular services (notably the issue of passports) to be performed in this country and the Fees (Increase) Act 1923 was passed to enable public officers of the Foreign Office in Great Britain also to levy the fees for such services. The next development was the emergence of our former colonies as independent nations, and the requirement for our High Commissions there to perform certain services which had previously been undertaken by the colonial governments. In fact, we seem to have been rather slow in adapting to the situation, as it was only by the Consular Relations Act 1968 that officials exercising consular functions at our High Commissions in Commonwealth countries were empowered to levy the relevant consular fees. In switching the



emphasis away from the formal designation of the officer performing the service, and to the service itself, these Acts of 1923 and 1968 undoubtedly were an advance.

We were still left, however, with the problem that in foreign countries, no matter how modest our diplomatic representation, a consular officer would formally have to be appointed before the mission could levy the requisite fee for any necessary consular service performed. (H.L. Debs., vol. 407, cols. 534-5: 24 March 1980.)

In the course of a debate on the imprisonment in Iraq of Mr. Ned Sparkes, a British businessman, the Minister of State, Foreign and Commonwealth Office, Mr. Douglas Hurd, stated:

We do not question the right of the Iraqi Government to make their own laws, to enforce their own laws and to arrest and imprison British subjects who break their laws. However, there are obligations under international treaties and international law. We expect that Iraq, as any other country, will comply with them. Many aspects of Mr. Sparkes' case are disquieting in that respect.

In spite of repeated representations, the Iraqi Government took three weeks to confirm that Mr. Sparkes had been arrested. We were not notified officially of the reasons for his arrest and detention. At the beginning he was not allowed regular consular access. The trial was held in secret and he was not permitted a defence lawyer. Our embassy in Baghdad was not notified of the trial or allowed to send a representative to it. In those respects, Iraq failed to comply with specific obligations under the Vienna convention on consular matters, to which it is a signatory. (H.C. Debs., vol. 987, cols. 2051-2: 4 July 1980.)

## **Part Five: VII. *Organs of the State—armed forces***

(See also Part Seven: II. B., *infra*.)

In reply to a question, the Parliamentary Under-Secretary of State, Ministry of Defence, wrote:

United States Forces are stationed in the United Kingdom under the general provisions of the North Atlantic Treaty, the Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty (1951) and the Visiting Forces Act 1952. The two former documents were presented to Parliament as Command Papers (Cmd. 7789 and 9363 respectively). More specifically, the use by United States Forces of bases and facilities in the United Kingdom is governed by the agreement reached by Mr. Attlee and President Truman in October 1951 and reaffirmed by Mr. Churchill and President Truman in a joint communiqué of January 1952. There are also a number of supplementary undertakings and agreements which either amplify these main documents or relate to the use of individual bases and facilities. Examples are the Exchange of Notes Relating to the Sale of Tobacco by the United States Government and the Construction of Housing and/or Community Facilities by the United Kingdom Government (Cmd. 9793 dated July 1956) and the Memorandum on a Ballistic Missile Early Warning Station in the United Kingdom (Cmd. 946 dated February 1960). Other documents in this category range from memoranda of understanding to less formal exchanges of letters between officials. (H.C. Debs., vol. 995, Written Answers, cols. 680-1: 10 December 1980.)

**Part Five: VIII. A. *Organs of the State—immunity of organs of the State—diplomatic and consular immunity***

In reply to a question on the subject of rate arrears on the Nigerian High Commission's hostel in London, the Lord Privy Seal wrote:

The property at 20–22 Inverness Terrace has been known to this Department over a number of years as a Nigerian students hostel and, as such, it enjoys no rating privileges under the Vienna Convention on Diplomatic Relations. The Department was told on 23 January that there were arrears of rates on this property and we are making enquiries into the matter to see whether there are any ways in which we can assist the council. (H.C. Debs., vol. 977, Written Answers, col. 768: 31 January 1980.)

In reply to a question about diplomatic immunity in relation to vehicles within the Metropolitan Police district, the Minister of State, Home Department, wrote:

In the 12-month period 2 December 1978 to 3 December 1979, 54,766 fixed penalty notices were cancelled on grounds of diplomatic immunity in the Metropolitan Police district. The amount of the fixed penalty specified in each notice was £6.

Corresponding information about excess charge notices is not available. (H.C. Debs., vol. 978, Written Answers, col. 523: 12 February 1980.)

In reply to questions, the Government Minister, Lord Trefgarne, stated:

... 5,264 officials of diplomatic missions in London, together with their families, are entitled to full or restricted diplomatic privileges and immunities. A further 846 are entitled to some privileges and immunities under the International Organisations Act 1968, mostly for official acts only.

... The privileges which we accord to diplomats in London are in line with those accorded to our own diplomats in almost every country in the world. They stem from the Vienna Convention on Diplomatic Relations of 1961 which was given effect in United Kingdom law by the Diplomatic Privileges Act 1964. (H.L. Debs., vol. 406, cols. 397–8: 6 March 1980.)

In the course of a debate on the subject of diplomatic immunity, the Minister of State, Foreign and Commonwealth Office, Mr. Douglas Hurd, made the following remarks:

In considering the question of diplomatic immunities we have to consider also our own diplomatic service and its needs. Our diplomats are enjoined and required strictly to observe not only the Vienna convention but the laws and regulations of the receiving State in which they happen to serve.

My hon. Friend rightly drew attention to certain aspects of the Vienna convention. He did not fall into the error, which one does sometimes see conveyed, that diplomats, through the convention and through their immunities, are absolved in some way from respecting the laws of the country in which they serve. That is not so. Article 41 of the Vienna convention is specific on that point. It states: 'Without prejudice to their privileges and immunities, it is the duty of

all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State.'

It is our intention to make it clear that that article must be respected in this country. We do not intend to allow embassies in London to become a haven from which illegal acts can be worked out and devised and from which such acts can be equipped and carried out by mischievously disposed persons.

... My hon. Friend referred rightly to the question of firearms, which obviously exercises us a great deal. It follows from article 41 of the Vienna convention, which I have already quoted, that diplomats here, all members of embassy and consulate staffs, are subject to the provisions of the Firearms Act 1968. That is to say they need a firearms certificate in respect of any type of firearm and ammunition, except shotguns for sporting purposes. For those they need a shotgun certificate.

... My hon. Friend referred to the possibility of the scanning of diplomatic bags in an effort to make sure that this abuse could not occur. He quoted, appositely, article 27 of the Vienna convention, which does not prohibit specifically scanning, but says that diplomatic bags shall not be 'opened or detained'. There is a practical point here which I have not seen mentioned in the press. I am advised that a scanner would not necessarily pick up a weapon in a diplomatic bag ...

... diplomatic bags may be used only for carrying objects or documents that are intended solely for official use by a diplomatic or consular mission. If there is hard evidence of malpractice in this respect which comes our way and satisfies our investigations, we shall not hesitate to take the necessary action.

My hon. Friend concluded by asking: why not amend the Vienna convention to tighten up these particular provisions? He will know from his professional experience that the convention cannot be amended unilaterally. One would have to reopen negotiations to secure agreement. A number of countries have proposed that the Vienna convention should be amended; but the design of those countries is that it should be amended to give more protection to the diplomatic bag and to the diplomatic courier. Those proposals are being mulled over by the International Law Commission. We have expressed the view—I think that my hon. Friend would agree—that sufficient protection is already given to the diplomatic bag and to the diplomatic courier, and that we should not seek to add to the protection. But the efforts to amend the Convention are in the opposite direction to that suggested by my hon. Friend.

The Vienna convention is a relatively modern and well-thought-out international law. The fault lies not in the convention, but in its imperfect observance. We are clear that with regard to this country and to our diplomatic service overseas, the convention must be observed. (H.C. Debs., vol. 985, cols. 1218–20: 2 June 1980.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

Article 27 of the Vienna Convention lays down that diplomatic bags should not be opened or detained. Article 22 gives inviolability to diplomatic premises. On the principles involved and the practice of Her Majesty's Government I would refer to the Statement which I made in the ... debate of 2 June. (H.C. Debs., vol. 985, Written Answers, col. 866: 5 June 1980.)



In reply to a question, the Minister of State, Home Department, provided the following table and explanatory note:

The . . . table shows . . . the number of offences alleged to have been committed in the five-year period 1975–1979 inclusive by persons entitled to diplomatic immunity where the possibility of criminal proceedings was not pursued in consequence of that entitlement. Since all these ‘offences’ are, by definition, unproved, we do not consider that it would be appropriate to relate allegations to particular missions.

OFFENCES ALLEGED TO HAVE BEEN COMMITTED BY PERSONS ENTITLED TO DIPLOMATIC IMMUNITY

	1975	1976	1977	1978	1979
Violence against the person	3	3	7	1	4
Sexual offences	1	2	3	0	3
Firearms and explosives	—	—	1	—	—
Offences against the Theft Act 1968 (including shoplifting)	22	25	24	23	34
Drugs offences	—	—	1	3	2
Drink offences (e.g. drunk and disorderly)	4	1	1	2	6
Road traffic offences involving drink	15	13	18	27	13
Other road traffic offences*	210	235	259	305	215
Other offences	1	1	2	5	7
	<u>256</u>	<u>280</u>	<u>316</u>	<u>366</u>	<u>284</u>

\* Excluding those dealt with by fixed penalty notices.

(H.C. Debs., vol. 985, Written Answers, cols. 871–2: 6 June 1980; for further particulars see vol. 989, Written Answers, cols. 51–2: 21 July 1980.)

In reply to further questions, the Minister of State provided a table of fixed penalty notices cancelled on grounds of diplomatic immunity. This table, which is not reproduced here, indicated that in the six months period April–September 1979 28,601 such notices were cancelled; in the six months period October–March 1980 the corresponding figure was 25,112. In reply to a further question, the Minister of State wrote:

A fixed penalty notice affixed to a vehicle owned or kept by a person entitled to diplomatic immunity is cancelled automatically if it is not paid within the prescribed period of 21 days. This necessarily involves the cancellation of any debt which would otherwise be due as a result of the notice.

. . . The amount specified in a fixed penalty notice is £6, but since the cancellation of a penalty notice on grounds of diplomatic immunity necessarily involves the cancellation of any debt which would otherwise be due as a result of it, the question of unpaid parking fines accumulating does not arise.

The total number of fixed penalty notices cancelled on the grounds of diplomatic immunity represents 6.15 per cent. of the total number of notices issued in 1979 by the Metropolitan Police. (H.C. Debs., vol. 985, Written Answers, cols. 873–8: 6 June 1980; for further statistics see vol. 989, Written Answers, cols. 52–5: 21 July 1980.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

Those members of the Libyan People's Bureau who have been notified to the Foreign and Commonwealth Office as members of the diplomatic or administrative and technical staffs have immunity from criminal jurisdiction, which includes parking offences. (H.C. Debs., vol. 988, Written Answers, col. 39: 7 July 1980.)

In reply to a question, suggesting that reciprocity should govern claims to diplomatic immunity for parking offences, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, Mr. Richard Luce, stated:

I agree with the hon. Gentleman that it is fair to suggest that there should be reciprocity. Although diplomatic immunity is provided under the Vienna convention, at the same time it is laid down in article 41 that diplomats in other countries are expected to follow and obey the law of those countries. However, I should point out that parking offences by diplomats in this country have been reduced by 40 per cent. in the last two years, and that is a source of encouragement. (H.C. Debs., vol. 988, col. 1480: 16 July 1980.)

In reply to a question, the Minister of State, Home Department, wrote:

When the police are satisfied that a person alleged to have committed a criminal offence is entitled to claim diplomatic immunity, they report the facts of the case to the Department. The Home Office then recommends to the Foreign and Commonwealth Office such further action as is considered appropriate. It is the practice for details of every alleged offence to be brought to the attention of the appropriate head of mission. (H.C. Debs., vol. 989, Written Answers, col. 50: 21 July 1980.)

In reply to the question what procedure is adopted at Her Majesty's diplomatic missions abroad where a person enjoying diplomatic immunity incurs the equivalent of a fixed penalty notice, the Minister of State, Foreign and Commonwealth Office, wrote:

Under our usual practice, the officer concerned would be expected to meet a fixed penalty fine himself or, if he disputed the offence, to challenge the penalty in the local courts or in any other way provided for under the local system. Exceptions would be where the Head of Mission is satisfied that the offence to which the penalty relates was genuinely and necessarily committed in the course of, or in furtherance of, the officer's official duties, or where there is evidence of harassment, when the officer's diplomatic immunity may be maintained. (H.C. Debs., vol. 989, Written Answers, col. 61: 21 July 1980.)

In reply to the question what happens to a British diplomat abroad when he is alleged to have committed a criminal offence, the Minister wrote:

Article 41 of the Vienna convention on diplomatic relations provides that, without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. If those laws and regulations are allegedly infringed by any of the staff of a British diplomatic mission abroad, the question arises whether their immunity

should be maintained or whether it should be waived. As a matter of principle, we would not expect personal diplomatic immunity to be unreasonably maintained in cases where waiver would not prejudice the work of the mission; but in most circumstances immunity in respect of official acts will be maintained. Any case in which a member of the staff of one of our missions was accused of a criminal offence would be considered within the framework of this general policy. (Ibid.)

In reply to the question what countries reserve the right to submit United Kingdom diplomatic bags to electronic surveillance, and whether such rights are exercised, the Minister of State, Foreign and Commonwealth Office, wrote:

No specific reservations of this character have been made by any party to the Vienna Convention on Diplomatic Relations. The majority of nations do not seek to impose electronic surveillance of diplomatic bags. (H.C. Debs., vol. 989, Written Answers, col. 406: 25 July 1980.)

In reply to the question whether Her Majesty's Government would consider legislation to prevent non-payment of parking fines by persons holding diplomatic immunity, the Minister of State, Home Department, Mr. Leon Brittan, stated:

No . . . The privilege of immunity from criminal jurisdiction—and therefore from any obligation to pay parking fines—is one which Her Majesty's Government are obliged to grant to diplomatic agents by virtue of their acceptance of the Vienna convention on diplomatic relations. Privileges afforded by that convention cannot be unilaterally withdrawn. (H.C. Debs., vol. 989, col. 1710: 31 July 1980.)

**Part Five: VIII. B. *Organs of the State—immunity of organs of the State—immunity other than diplomatic***

In reply to a question about the entry and settlement in the United Kingdom of members of the family of King Khaled of Saudi Arabia, the Minister of State, Home Department, wrote:

Heads of State and members of their family who form part of their household are entitled under section 20(3) of the State Immunity Act 1978 to the exemption from immigration control conferred by section 8(3) of the Immigration Act 1971. Other applications are dealt with under the Immigration Rules. (H.C. Debs., vol. 983, Written Answers, col. 459: 29 April 1980.)

On 3 July 1979, the Legal Adviser to the Foreign and Commonwealth Office, Sir Ian Sinclair, replied to a circular, dated 18 January 1979, from the Legal Counsel to the United Nations, Mr. Eric Suy, in which the latter invited the United Kingdom Government to submit relevant material on the topic of jurisdictional immunities of States and their property, including national legislation, decisions of national tribunals, and diplomatic and official correspondence. The reply ran in part as follows:

On 3 July, 1979, the United Kingdom Government deposited instruments of ratification of the European Convention on State Immunity, signed at Basle on



16 May 1972, and of the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships, signed at Brussels on 10 April 1926, and the Supplementary Protocol to the Brussels Convention signed at Brussels on 24 May 1934. The instrument of ratification of the European Convention on State Immunity was accompanied by a number of declarations, and the instrument of ratification of the Brussels Convention was accompanied by a number of reservations. . . .

. . . Special United Kingdom legislation was required to bring United Kingdom law into conformity with the obligations to be assumed under these two Conventions. This legislation, the State Immunity Act 1978, came into force for the United Kingdom on 22 November 1978, and as regards other territories to which the Conventions have been extended, on 2 May 1979. I enclose copies of the State Immunity Act 1978 (Commencement) Order 1978, and of the State Immunity (Overseas Territories) Order 1979. St Helena, to which both the Conventions have been applied, enacted its own legislation and was therefore not covered by the State Immunity (Overseas Territories) Order 1979.<sup>1</sup> Two other Orders in Council have been made under the State Immunity Act. The State Immunity (Merchant Shipping) (Union of Soviet Socialist Republics) Order 1978 was required to give effect to the provisions of the Protocol to the Treaty on Merchant Navigation between the United Kingdom and the Soviet Union, signed in Moscow on 1 March 1974. The State Immunity (Federal States) Order 1979 was required because Austria, which is a party to the European Convention on State Immunity has, in accordance with Article 28 of that Convention, notified her constituent territories as being entitled to invoke the provisions of the Convention applicable to Contracting States.

. . . When the State Immunity Bill was before the United Kingdom Parliament copies of it were sent to all diplomatic missions in London on two occasions. The first version was a print of the State Immunity Bill as it was introduced in the House of Lords on 13 December 1977. This was accompanied by a circular letter of 9 January 1978 which explained the purpose of the legislation, made clear that the Bill would also place on a statutory basis the privileges and immunities enjoyed by Heads of State in their personal capacity, and offered arrangements to Federal States under which their constituent territories might be accorded sovereign immunity in the United Kingdom. The note explained that the United Kingdom intended to apply the provisions of the Bill to all sovereign States in the belief that the provisions of the European Convention reflected with sufficient accuracy general State practice in the field of sovereign immunity. As a result of debates in the House of Lords, the Bill underwent considerable changes before being introduced into the House of Commons on 4 April 1978. The Bill as it was introduced into the House of Commons was circulated again to diplomatic missions on 12 May 1978. The most significant changes made to the Bill as a result of the debates in the House of Lords were the following:

- (1) the provision dealing with commercial transactions and contractual obligations to be performed in the United Kingdom (now section 3 of the Act) was extended; and

<sup>1</sup> By the State Immunity (Application) Order 1979, made pursuant to powers conferred by ss. 3 and 4 of the English Law (Application) Ordinance 1970.

- (2) provision was made permitting, in certain cases and subject to certain qualifications, execution in respect of property for the time being in use or intended for use for commercial purposes.

No State which was sent the legislation in draft offered substantive criticism of its terms. (Text provided by the Foreign and Commonwealth Office.)

On 17 September 1980 Sir Ian Sinclair provided further material to the Legal Counsel of the United Nations along the lines of a reply to a questionnaire drafted by the Special Rapporteur of the International Law Commission on the topic of state immunity, Ambassador Sompong Sucharitkul, in co-operation with the United Nations Secretariat. The questions, together with the replies of the United Kingdom Government, are substantially set out below:

- (1) *Are there laws and regulations in force in your State providing either specifically for jurisdictional immunities for foreign States and their property or generally for non-exercise of jurisdiction over foreign States and their property without their consent? If so, please attach a copy of the basic provisions of those laws and regulations.*

Please refer to . . . Sir Ian Sinclair's letter of 3 July 1979 and to the legislative materials transmitted under cover of that letter.

- (2) *Do courts of your State accord jurisdictional immunities to foreign States and their property? If so, please indicate whether they have based their decisions on any provisions of internal law in force or on any principle of international law.*

The courts of the United Kingdom have traditionally accorded very wide jurisdictional immunities to foreign States and their property. The relevance of international law has been affirmed in many cases, from *The Parlement Belge* (1880) 5 P.D. 197 (per Brett L.J. at p. 205), to *The Cristina* [1938] A.C. 485 (per Lord Wright at p. 502) and to the recent judgment of the Court of Appeal in *1º Congreso del Partido* [1980] 1 Lloyd's Rep. 23 (per Lord Denning at p. 29). As the rules enunciated in earlier United Kingdom cases had been stated to be in conformity with international law, it came in more recent cases to be regarded as proper to rely on these cases as precedents. The development of a growing international trend towards the application of the restrictive rule of immunity accordingly entailed for a period some divergence between United Kingdom case-law and that growing trend. In the *Philippine Admiral* [1977] A.C. 373, the Privy Council indicated that the rule of absolute immunity had been applied more widely in respect of actions *in rem* than it need have been, as a matter of English law; and in the case of *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria* [1977] Q.B. 529 (following an earlier discussion of the general issue in the case of *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan, Ministry of Food and Agriculture* [1975] 1 W.L.R. 1485) the question arose as to whether the courts continued to be bound by earlier precedents which could be shown to be no longer in accord with international law. That this remains a controversial issue can be seen from studying the separate judgments in the Court of Appeal in the *Trendtex* case.

In seeking to identify contemporary international law on other aspects of the law relating to the jurisdictional immunities of States and their property, the United Kingdom courts have in recent years shown a willingness to pay close regard to the practice and decisions in other jurisdictions. In this context, it may be noted that, in the case of *1º Congreso del Partido*, Mr Justice Goff cited cases decided by the courts in Sweden, the Federal Republic of Germany, Italy and the United States of America; and, referring to affidavit evidence put before him by a number of distinguished foreign lawyers, stated:—

‘Indeed, the evidence before me reveals only too clearly the isolated position which was until very recently occupied by this country in adhering to the absolute doctrine of sovereign immunity in the case of actions *in personam*’: [1978] Q.B. 500, at p. 529.

The State Immunity Act 1978 entered into force on 22 November 1978, but the statutory rules therein set out are only applied automatically by the courts in relation to matters that occurred subsequent to that date. Sections 23 (3) and (4) of the Act provide:

‘(3) Subject to subsection (4) below, Parts I and II of this Act do not apply to proceedings in respect of matters that occurred before the date of the coming into force of this Act and, in particular—

- (a) sections 2 (2) and 13 (3) do not apply to any prior agreement, and
- (b) sections 3, 4 and 9 do not apply to any transaction, contract or arbitration agreement,

entered into before that date.

‘(4) Section 12 above applies to any proceedings instituted after the coming into force of this Act.’

The United Kingdom Government made clear during the passage of the State Immunity Act that it was intended to reflect modern international law, and its provisions will therefore have a persuasive effect even in cases where it is not directly binding on the courts. Thus Counsel for both parties relied heavily on its provisions during the conduct of the case of *1º Congreso del Partido*. But the proceedings and judgment in the case of *Uganda Holdings v. Government of Uganda* [1979] 1 Lloyd’s Rep. 481 show that individual courts may still, during an interim period where the facts ante-date the entry into force of the State Immunity Act, have regard to the previous rules applied in United Kingdom cases.

(3) *What are the main trends of the judicial practice of your State in regard to jurisdictional immunities of foreign States and their property? Do the courts regard the doctrine of State immunity as ‘absolute’, and if not, is its application subject to qualifications or limitations?*

The main trend of the judicial practice of United Kingdom courts over the last 25 years has been a gradual shifting of the courts away from their previous attachment to the doctrine of absolute immunity, and a greater readiness to deny immunity to separate entities associated with or subservient to but not forming part of the State itself. This trend first became apparent in the case of *Baccus S.R.L. v. Servicio Nacional del Trigo* [1957] 1 Q.B. 438; *International Law Reports* (1956), p. 160. In this case the Court of Appeal by a majority of 2 to 1 held



that the defendants who had separate legal personality according to Spanish law but claimed to be a Department of the Spanish Ministry of Agriculture were entitled to State immunity because their functions were those of a government department. Singleton L.J. however would have denied the claim to immunity on account of the separate legal personality of the defendants. This continued emphasis on the *status* of the entity as being determinative of whether immunity should be granted was paralleled by a growing tendency to query whether it was correct to apply the rule of absolute immunity in respect of all transactions and disputes. Thus, Singleton L.J., in the *Baccus* case, stated:—

‘A State may create many such trading entities and if they act in the ordinary course it ought not to be open to the State to say they were not authorized so to do. Otherwise trading and business relationships would become impossible.’

In the case of *Rahimtoola v. Nizam of Hyderabad* [1958] A.C. 379; *International Law Reports* (1957), p. 157, Lord Denning challenged the basis upon which claims to immunity had hitherto been decided by the United Kingdom courts and called for a new test which would have greater regard to principles than being applied in other jurisdictions and would depend essentially on the nature of the dispute. He argued:

‘If the dispute brings into question, for instance, the legislat[ive] or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country: but if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity.’

The majority of the House of Lords however did not at the time endorse this approach. In *Thai-Europe Tapioca Service Ltd v. Government of Pakistan, Ministry of Food and Agriculture*, in 1975, Lord Denning, again unsupported by his colleagues in the Court of Appeal, expressed readiness to accept into English law a number of exceptions to the rule of absolute immunity which were coming to be recognized in other jurisdictions. Lord Denning listed as exceptions to the rule of absolute immunity actions in respect of land in England, in respect of trust funds in England, in respect of debts incurred in England for services to property of the foreign State in England and in respect of commercial transactions where the dispute is properly within the territorial jurisdiction of English courts.

In the same year, in the case of the *Philippine Admiral*, the Privy Council conducted a radical examination of the doctrine of absolute immunity and the English case law on the matter over the previous century and refused to allow immunity in respect of actions *in rem* brought against State-owned vessels engaged in commercial activities. Lord Cross in his judgment pointed out that ‘the trend of opinion in the world outside the Commonwealth since the last war has been increasingly against the application of the doctrine of sovereign immunity to ordinary trading transactions’. Soon afterwards in 1977, the Court of Appeal in the case of *Trendtex Trading Corporation Limited v. The Central Bank of*

*Nigeria* held unanimously that the Central Bank was not identical with the Government of Nigeria, and by a majority of two to one that the doctrine of sovereign immunity no longer applied to ordinary trading transactions and that the restrictive doctrine of immunity should be applied to actions *in personam* (with which that case was concerned) as well as to actions *in rem*. This case was however not taken to the House of Lords. In the following year the State Immunity Act became law, but as is illustrated by the case of *Uganda Company (Holdings) Ltd. v. Government of Uganda*, its rules, which incorporate the restrictive theory of sovereign immunity and are based on the European Convention on State Immunity, are not as such applicable to claims arising from facts prior to the entry into force of the Act. There have, as yet, been no reported judicial decisions on the State Immunity Act.

It will accordingly be seen that the trend of judicial decisions in the United Kingdom indicates a steady movement away from the old doctrine of absolute immunity.

(4) *What is the role of the Executive branch of the Government of your State in matters of recognition of jurisdictional immunities of foreign States and their property, especially in the definition or delimitation of the extent of the application of State immunity?*

The role of the Executive branch of the United Kingdom Government in matters involving claims to jurisdictional immunities of foreign States and their property is confined to responding to requests from the courts for certificates by a Secretary of State (normally the Secretary of State for Foreign and Commonwealth Affairs). These certificates are, in accordance with the constitutional practice of the United Kingdom, limited to matters which are peculiarly within the knowledge of the Secretary of State. A certificate having this character has traditionally been regarded by the courts in the context of State immunities (as in other contexts) as binding on them, although it will still be for the courts to draw the appropriate legal consequences (the executive taking no part in the definition or delimitation of the scope of jurisdictional immunity in any particular case). The traditional practice is now codified in section 21 of the State Immunity Act 1978 which sets out the matters on which a certificate by or on behalf of the Secretary of State is to be treated as conclusive evidence, namely:

- (a) whether any country is a State for the purposes of Part I of this Act, whether any territory is a constituent territory of a federal State for those purposes or as to the person or persons to be regarded for those purposes as the head or government of a State;
- (b) whether a State is a party to the Brussels Convention mentioned in Part I of this Act;
- (c) whether a State is a party to the European Convention on State Immunity, whether it has made a declaration under Article 24 of that Convention or as to the territories in respect of which the United Kingdom or any other State is a party;
- (d) whether, and if so when, a document has been served or received as mentioned in section 12 (1) or (5) above.

It will be noted that the question whether a given entity is to be regarded as forming part of a sovereign State or as constituting a 'separate entity' with much

more limited immunity is not one covered by the terms of section 21. This would therefore normally be regarded as a question of foreign law in United Kingdom courts.

(5) *Is the principle of reciprocity applicable in the matters relating to jurisdictional immunities of States and their property? Inter alia, would courts of your State be expected to apply the principle of reciprocity to a foreign State which would deny your State immunity in a dispute similar to the one pending before your courts, even if the courts would normally grant immunity to other foreign States in such disputes?*

In general, the principle of reciprocity is not of much consequence in the application by United Kingdom courts of the rules of State immunity. United Kingdom courts do not appear to have attached any practical weight to the question of whether the State being sued in legal proceedings would itself give immunity to the United Kingdom if a similar action were to be brought in the courts of its country. In the *Dollfus Mieg Case* ([1950] 1 All E.R. 747), however, Lord Justice Somervell suggested in the Court of Appeal that 'where a foreign government seeks to stay proceedings, the court should be satisfied by evidence that the law of that country grants immunity on the basis that is being sought here.' But it is fair to say that, in the House of Lords, Lord Porter expressly dissociated from the suggestion that reciprocity might be a relevant factor:—

'It was suggested that immunity would only be granted where the country claiming it, in itself, granted reciprocal immunity to other nations. I can find no authority for this proposition, and in any case it was not taken either before Jenkins J. or in the Court of Appeal, and no material of fact has therefore been presented to your Lordships to enable them to deal with the argument or to ascertain whether the two governments concerned grant reciprocal immunity or not. In my view, the argument in any case is not established. The question is what is the law of nations by which civilized nations in general are bound, not how two individual nations may treat one another.': [1952] A.C. 582, at p. 613.

While reciprocity has not generally been regarded as an appropriate criterion in international law, the State Immunity Act 1978 pays some regard to reciprocity in that section 15 enables Orders in Council to be made restricting immunities and privileges where a lower degree of immunity is accorded by the law of the relevant State, or increasing them if such action is required to give effect to a treaty or other international agreement to which that State and the United Kingdom are parties. The powers in section 15 have been used to give effect to provisions of the Protocol to the Treaty on Merchant Navigation between the United Kingdom and the Soviet Union, signed at London on 3 April 1968. . . . No Order in Council has yet been made with the purpose of restricting the immunities accorded to any foreign State.

(6) *Do the laws and regulations referred to under Question 1 or the judicial practice referred to in Question 3, make any distinction, as far as jurisdictional immunities of foreign States and their property are concerned, between 'public acts' and 'non-public acts' of foreign States? If so, please outline the distinctions, and provide examples of their application.*

The State Immunity Act does not distinguish between 'public acts' and 'non-public acts' in those terms. It does however distinguish between acts which are performed in the exercise of sovereign authority and other acts not so performed.



Sections 3–8 set out detailed descriptions of categories of cases in which States will not be accorded immunity, and these cases may collectively be described as involving acts not performed in the exercise of sovereign authority (i.e. acts *jure gestionis*). Section 10 makes provision in regard to ships which is intended to give effect to the distinction between using a ship for purposes related to sovereign authority and for commercial purposes—a distinction set out in the Brussels Convention of 1926 to which this section gives effect. Section 3 of the State Immunity Act defines the term ‘commercial transaction’ which has given difficulty to the courts in many jurisdictions who have attempted to draw a distinction between commercial activities and activities in the exercise of sovereign authority. In this definition, two categories of transaction—contracts for the supply of goods or services and loans or other transactions for the provision of finance (together with related guarantees and indemnities) are expressly characterized as being commercial transactions. As regards other transactions or activities—if these are of a commercial, industrial, financial, professional or other similar character—the courts are required to characterize them as commercial transactions not entitled to immunity unless the State is engaged in the activity ‘in the exercise of sovereign authority’.

An account has already been given in the reply to Question (3) of the two important recent cases—the *Philippine Admiral* and *Trendtex Trading Corporation v. Central Bank of Nigeria*—in which the Privy Council and Court of Appeal have incorporated into English case-law the broad distinction between acts *iure imperii* and *iure gestionis*, denying immunity as regards the latter both for actions *in rem* and actions *in personam*.

(7) *If the answer to Question (6) is ‘yes’:*

(a) *can jurisdictional immunities be successfully invoked before courts in your State in connexion with ‘non public acts’ of foreign States? If not please indicate the types of ‘non public acts’ of foreign States not covered by immunities.*

The types of acts of foreign States not covered by immunities are set out in sections 3–11 of the State Immunity Act.

Some of these exceptions to immunity could be regarded as having been already accepted in earlier judicial decisions—in particular section 3 reflects the decision of the Court of Appeal in the case of *Trendtex Trading Corporation v. Central Bank of Nigeria*, section 6 reflects the earlier decision in the case of *Larivière v. Morgan* ((1849) 2 H.L.C. 1) and section 10 reflects the decision of the Privy Council in the case of the *Philippine Admiral*.

(7) (b) *in a dispute relating to a contract of purchase of goods, would courts of your State be expected to grant immunity to a foreign State which establishes that the ultimate object of the contract was for a public purpose or the contract was concluded in the exercise of a ‘public’ or ‘sovereign’ function?*

There is no recent decided case in United Kingdom courts turning precisely on this point. But where the case comes within the State Immunity Act, the courts would not grant immunity to a foreign State in a dispute relating to a contract for the purchase of goods, whether or not the ultimate object of the contract was for a public purpose or the contract was concluded in the exercise of a ‘public’ or ‘sovereign’ function. The commercial transactions in respect of which immunity

will no longer be granted under the Act include 'any contract for the supply of goods or services' (section 3 (3) (a)).

- (7) (c) *in a dispute relating to a foreign State's breach of a contract of sale, would courts of your State be expected to grant immunity to a foreign State which establishes that its conduct was motivated by public interests?*

The answer to this question cannot be now regarded as clear, since the recent case in which this question was a crucial issue, *Iº Congreso del Partido*, is expected to be heard on appeal by the House of Lords. It will be seen from a study of the two judgments delivered in the Court of Appeal by Lord Denning and by Waller L. J. that although both judges agreed that regard must be paid to the nature of the act or dispute in question, they differed in applying this approach to a case in which a breach of a commercial contract occurred for political reasons. On the one hand Waller L. J. said:

'In my opinion in this case it was the act of the government of the Republic of Cuba which prevented these cargoes from being delivered. I do not think it is possible to say that the act was clearly commercial in its nature. It was not like the *Empire of Iran* a mere refusal to foot the bill for the work done. It was not like the case of *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 1 Q.B. 529, where there was a cancellation of contracts because too much had been ordered. No suggestion has been made that it was in the commercial interests of the Republic of Cuba to cease trading with Chile. On the contrary, it was a political decision, a foreign policy decision which bore no relation to commercial interests. The dispute would bring into question 'Legislative or international transactions of a foreign government, or the policy of its executive' (see per Lord Denning in *Rahimtoola* [1958] A.C. 422). I am of opinion therefore that subject to certain subsidiary points with which I must deal the Republic of Cuba is entitled to claim sovereign immunity in these two cases.'

On the other hand, Lord Denning said:—

'Such an act—a plain repudiation of a contract—cannot be regarded as an act of such a nature as to give rise to sovereign immunity. It matters not what was the purpose of the repudiation. . . . It was in fact done out of anger at the coup d'état in Chile and out of hostility to the new régime. That motive cannot alter the nature of the act. Nor can it give sovereign immunity where otherwise there would be none. It is the nature of the act that matters, not the motive behind it.'

Lord Denning thought that there could be no immunity for acts of a government motivated by public interest when those acts came not 'out of the blue' but in the context of an existing contract of sale.

- (7) (d) *in any dispute concerning a commercial transaction, is the nature of the transaction decisive of the question of State immunity; if not, how far is ulterior motive relevant to the question?*

The State Immunity Act does not in terms direct the courts to have regard to the nature of a transaction rather than to the ulterior motive underlying it; but the

exceptions to immunity which are set out in sections 3 to 11 of the Act are so formulated as to require that attention be directed to the objective nature of particular transactions and not to their purpose. This is particularly true of the definition of 'commercial transaction' in section 3 (3) of the Act.

The Act does not deal expressly with the question of the nature or motive of a *breach* of contract, an issue which has been examined in the *Iº Congreso del Partido* case, and which is expected to be determined by the House of Lords on appeal.

(8) *If 'non-public' activities of a foreign State in the territory of your State are such as to be normally susceptible to payment of taxes, duties or other levies, would the foreign State be required to pay them or would it be exempted in all cases or on the basis of reciprocity?*

The question of proceedings to enforce liability to some forms of taxation is dealt with in section 11 of the State Immunity Act, which provides that a State is not immune as respects proceedings relating to its liability for value added tax, any duty of customs or excise, or any agricultural levy or rates in respect of premises occupied by it for commercial purposes. Proceedings regarding possible liability for any other form of tax are expressly excluded by section 16 (5) of the Act from its provisions dealing with immunity from jurisdiction, but a State would generally be regarded at present as immune from such proceedings under United Kingdom common law. Proceedings in regard to taxation claims are excluded from the European Convention on State Immunity.

For the most part liability for the taxes listed in section 11 would be incurred by a State only in the course of commercial activities. Taxation in connexion with the diplomatic or consular activities is, of course, dealt with separately under the legislation giving effect to the Vienna Convention on Diplomatic and Consular Relations.

The State Immunity Act does not deal with the question of substantive liability to taxation, and there has been no recent legislation on this question. The United Kingdom has found it difficult to deduce from detailed examination of the practice of other States in the field of taxation of foreign sovereigns any very clear rules or principles in this area. The practical position in the United Kingdom in regard to taxation of commercial activities of foreign States in the United Kingdom is as follows: Foreign States enjoy at present complete immunity from UK taxation on income and capital although companies (even if wholly owned by foreign States) whose shares they own would still be liable in principle to normal corporation tax. If however the assets of the company wholly owned by a foreign State were to be transferred to the direct beneficial ownership of that Government, the income arising from the assets would be free both of corporation tax and income tax. Specific legislation (Finance Act, 1972 section 98 (4)) gives foreign States a dividend tax credit on equity shares in United Kingdom companies. On the other hand, foreign States are treated as liable to VAT and customs duties (apart from diplomatic or consular purchases or imports). With the exception of diplomatic or consular property, for which special arrangements are made, property occupied by foreign States for commercial purposes is treated as liable for rates and only in a few cases where there was some claim to diplomatic or consular privilege has there been any question of non-payment of rates or claims for exemption.



(9) *Are the courts of your State entitled to entertain jurisdiction over any public acts of foreign States? If so, please indicate the legal grounds on which competence is based, such as consent, or waiver of immunity, or voluntary submission etc. If jurisdiction is exercised in such cases, does it mean that the doctrine of State immunity is still recognized by the courts?*

As has been explained, the distinction in United Kingdom law between acts where immunity will be granted and acts where it will not does not turn precisely on whether the acts are public or non-public. To the extent that the term 'public acts' may be identified with acts *iure imperii*, United Kingdom courts are entitled to exercise jurisdiction where a dispute involves such acts only on the basis of a waiver of immunity or a voluntary submission to the jurisdiction. It is not thought that there is any substantive difference so far as consequences for immunity are concerned between the terms 'waiver' and 'submission to the jurisdiction'. The rules in regard to submission to the jurisdiction are set out in detail in section 2 of the State Immunity Act. With one exception these rules reflect the previous law as it emerges from decided cases. The exception concerns the rule in section 2 (2) that a State may submit to the jurisdiction by a prior written agreement. It was clear from earlier decided cases: *Mighell v. Sultan of Johore* [1894] 1 Q.B. 149, *Duff Development Co. v. Kelantan Government* [1924] A.C. 797 and *Kahan v. Pakistan Federation* [1951] 2 K.B. 1003, that waiver to be effective had to take place 'before the court', that is in respect of proceedings actually begun. Section 2 (2) has altered this rule but, by virtue of section 23 (3), section 2 (2) will not apply to any agreement concluded before 22 November 1978 (the date of entry into force of the State Immunity Act).

The exercise of jurisdiction on the basis of a waiver or submission by a foreign State is not regarded by United Kingdom courts as in any way inconsistent with the doctrine of State immunity.

(10) *What rules are in force in your State, if any, governing:*

- (a) *waiver of jurisdictional immunities of foreign States;*
- (b) *voluntary submission by foreign States;*

The rules in force have been set out in the answer to question (9).

- (c) *counter-claims against foreign States?*

The rules in the United Kingdom in regard to counter-claims are set out in section 2 (6) of the State Immunity Act. The question of counter-claims has been examined by United Kingdom courts chiefly in the context of diplomatic rather than sovereign immunity, but it is thought that the approach in section 2 (6) would even in the absence of the Act have been followed by the courts.

(11) *What are the exceptions or limitations, if any, provided by laws and regulations in force or recognized by judicial or governmental practice in your State with respect to jurisdictional immunities of foreign States and their property?*

It is thought that sufficient material on exceptions or limitations to jurisdictional immunities of foreign States and their property in the United Kingdom has already been set out, particularly in the answers to questions (3) and (6).

(12) *What is the status, under laws and regulations in force or in practice in your State, of ships owned or operated by a foreign State and employed in commercial service?*

The rules applied by United Kingdom courts to ships owned or operated by a foreign State and employed in commercial service have been developed in a series of cases to which reference has already been made. Most significant of the recent decisions which have examined the status of State-owned or operated ships in commercial service are the *Philippine Admiral* and *Iº Congreso del Partido*. Section 10 of the State Immunity Act now embodies statutory rules in relation to ships, these rules denying immunity to a State, as regards both actions *in rem* and actions *in personam*, if at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes. The primary objective of the rules set out in section 10 was to enable the United Kingdom to ratify the Brussels Convention of 1926 for the Unification of Certain Rules concerning the Immunity of State-owned Ships. The United Kingdom ratification of the Convention however, as the enclosure to Sir Ian Sinclair's letter of 3 July, 1979, makes clear, was accompanied by certain minor reservations, whose essential purpose was either to simplify the structure of section 10 of the State Immunity Act or to take into account its rather complicated inter-relation with the European Convention on State Immunity.

(13) *If a foreign State applies to administrative authorities of your State for a patent, a licence, a permit, an exemption or any other administrative action, would it be treated procedurally or substantively, like any other applicant or would it receive special treatment on the procedure or on the substance?*

If a foreign State applied to the appropriate authorities in the United Kingdom for a patent, licence, permit, or exemption or any other administrative action (for example, planning permission in respect of alterations to buildings) it would normally be treated, as regards procedure or substance, like any other applicant. But the nature of the permission being sought would clearly be relevant. Special regard might have to be paid to the status of the applicant as a foreign State or to particular treaty obligations owed to it—for example, a foreign embassy would be given assistance in finding diplomatic accommodation because of Article 21 of the Vienna Convention on Diplomatic Relations. Such assistance would not be given to other private persons.

(14) *If a foreign State owns or succeeds to an immovable or movable property situated in your State, how far is the foreign State subject to territorial jurisdiction in respect of title to that property or other property rights?*

Section 6 of the State Immunity Act provides that a State is not immune as respects proceedings relating to title to immovable property in the United Kingdom, as well as other proceedings relating to immovable property; but, by virtue of section 16 (1) of the Act, a State would still be entitled to assert immunity in proceedings concerning its title to or its possession of property used for the purposes of a diplomatic mission. There are in addition in section 6 exceptions to immunity in respect of proceedings relating to any interest of the State in movable or immovable property, being an interest arising by way of succession, gift or *bona vacantia*. The fact that a State has or claims an interest in any property moreover does not preclude a court from exercising its ordinary jurisdiction on a succession matter. Foreign States could also be subject to the jurisdiction of United Kingdom courts in regard to other rights or claims to movable property if the action fell within other exceptions to immunity set out in the Act (for example, section 3, section 7, section 8 or section 10).

The principles set out in section 6 of the Act reflect to some extent principles which may be derived from earlier English cases (for example, *Larivière v. Morgan*, and Lord Denning's judgment in *Thai-Europe Tapioca Service Ltd v. Government of Pakistan*).

(15) *Can a foreign State inherit or become a legatee or a beneficiary in a testate or intestate succession? If so, is voluntary submission essential to a meaningful involvement in the judicial process?*

A foreign State may inherit or become a legatee or a beneficiary in a testate or intestate succession. Because of the provisions explained in the answer to question (14) a voluntary submission is not, in fact, essential to enable the courts to settle legal questions which may arise in such a case.

(16) *Under laws and regulations in force in your State, does the property of a foreign State enjoy immunity from attachment and other provisional or interim measures prior to an executory judicial decision? Is there any distinction based on the nature or on the use of property involved?*

In the case of *Trendtex Trading Corporation v. Central Bank of Nigeria*, the court permitted the property of the Nigerian State to be made the subject of a 'Mareva' injunction. Under the Mareva injunction procedure a defendant ordinarily resident and domiciled outside the jurisdiction may be enjoined from moving assets out of the jurisdiction of English courts where there is a good arguable case against him and some possibility that because he does not have a permanent business presence in this country, funds might not be available to meet any ultimate judgment. It is possible that in a case where the facts preceded the entry into force of the State Immunity Act, the courts might follow this precedent (as has already occurred) and grant such an injunction. But future practice must be regarded as uncertain.

The position was altered in section 13 of the State Immunity Act as regards cases not excluded from the operation of the Act by section 23 (3). Section 13 (2) (a) provides that, subject to the possibility of the court awarding interim attachment by consent, 'relief shall not be given against a State by way of injunction'. The generality of this provision would exclude the possibility of a court attaching assets of a foreign State defendant pending proceedings.

The Mareva injunction is a relatively recent remedy, and, except in the case of ships, attachment of property has been relatively rare in English courts. There has not therefore been consideration in earlier case-law of whether the nature or use of property should be relevant in considering whether to allow attachment. The State Immunity Act does not distinguish in this context in regard to the nature or use of property involved.

(17) *Similarly, does the property of a foreign State enjoy immunity from distraint and other forcible measures in aid of execution of a judicial decision? Is there any distinction based on the nature or on the use of the property involved?*

Prior to the State Immunity Act, there was no case in which the United Kingdom courts permitted forcible execution of a judicial decision against a foreign State. The cases clearly established that immunity from execution must be regarded as distinct from immunity from jurisdiction, so that even where a waiver was granted in respect of proceedings, a separate waiver would be required before execution could take place.



Section 13 of the State Immunity Act has however altered the previous position so that in cases within the Act execution against property in use or intended for use for commercial purposes is permitted with certain safeguards, exception being made for the property of States party to the European Convention on State Immunity. The detailed rules are set out in section 13 (2), (3) and (4). A distinction is drawn in regard to the nature of the property in that only property which is for the time being in use or intended for use for commercial purposes may be subjected to any process for the enforcement of a judgment or arbitration award.

It should also be noted that section 14 (4) provides that property of a State's Central Bank or other monetary authority shall not for the purposes of section 13 (4) be regarded as in use or intended for use for commercial purposes. The effect of section 14 (4) is that assets of a foreign State Central Bank or other monetary authority, whether or not the bank or authority is a separate entity from the State, are absolutely protected from any form of attachment or execution.

*(18) Are there procedural privileges accorded a foreign State in the event of its involvement in a judicial process? If so, please elaborate.*

The procedural privileges accorded to a foreign State against which proceedings are instituted in the United Kingdom are set out in section 12 of the State Immunity Act. This section applies to any proceedings instituted after the coming into force of the Act (section 23 (4)).

*(19) Are foreign States exempt from costs or security for costs in the event of participation in a judicial process?*

There are no special provisions in United Kingdom law in regard to costs or security for costs for a foreign State in the event of its participation in a judicial process.

*(20) Is your State inclined to invoke jurisdictional immunities before foreign courts, where, in like circumstances, none would be accorded to foreign States by the courts of your State? Or conversely, are courts in your State prepared to grant jurisdictional immunities to foreign States to the same extent as that to which your State is likely to claim immunities from foreign jurisdiction?*

In deciding whether to invoke jurisdictional immunities before foreign courts, the United Kingdom, at least in recent years, has tended to have regard to the domestic law of the State concerned in the matter of State immunity (unless this was thought to be inconsistent with general international law) rather than to the position as it would be if proceedings against that State were instituted in the United Kingdom.

United Kingdom courts will not in giving effect to the rules of State immunity pay any regard to the extent to which the UK claims immunity from the jurisdiction of foreign courts. (Text provided by the Foreign and Commonwealth Office; some case references added by the editor.)

In the course of his speech on 17 November 1980 in the Sixth Committee of the General Assembly of the United Nations on the subject of the Report of the International Law Commission on jurisdictional immunities of States and their property, the United Kingdom delegate, Sir Ian Sinclair, stated:

It may not be necessary for the Commission, at this stage of the development of its work, to form a view on whether there is a basic principle of State immunity from which exceptions can and must be carved out, or a basic principle of exclusive territorial jurisdiction from which exceptions can and must be carved out on the basis of, for example, the notion of the express or implied licence to which reference is made in *Schooner Exchange v. McFaddon*. The difference between the two approaches is however crucial. The first requires that exceptions to a basic rule of immunity must be justified; the second requires that exceptions to the overriding principles of exclusive territorial jurisdiction be justified. (Text provided by the Foreign and Commonwealth Office.)

**Part Six: I. C. *Treaties—conclusion and entry into force—entry into force***

The Department of Trade provided the following note, dated April 1980, to the Industry and Trade Committee of the House of Commons in preparation of its Third Report, being the follow-up to the Second Report by the former Expenditure Committee on measures to prevent collisions and strandings of noxious cargo carriers in waters around the United Kingdom:

FACTORS AFFECTING THE SPEED OF ENTRY INTO FORCE OF CONVENTIONS

1. The first factor affecting the speed of entry into force of a convention is the conditions for entry into force written into that convention—in terms of number of ratifications, proportion of world tonnage, or whatever.
2. These conditions generally represent a compromise between a desire for the early entry into force of the agreed standards for at least the ships of some countries, which points to a lower required number of ratifications or whatever; and a desire for a more general application of the agreed standards, either because of their nature (the Collision Regulations) or because of their competitive implications, which points to a higher required number of ratifications or whatever. (The cost of complying with obligations embodied in conventions and the possible competitive disadvantage arises at the time of implementation rather than at the time of ratification.)
3. The second factor is the speed with which individual states actually ratify conventions. This in turn breaks down into a number of elements.
4. The constitutional procedures involved in ratification vary between states, and are sometimes complex and lengthy. In the United Kingdom the constitutional practice is that the Government does not normally ratify a convention until any necessary implementing *primary* legislation has been enacted. The widely drawn regulation making powers under Sections 20 and 21 of the Merchant Shipping Act 1979 are intended to facilitate the ratification of already agreed and *future* safety and pollution prevention conventions.
5. Some conventions establish a framework and leave some of the detailed requirements to be settled in future international discussion. The framework may presuppose advances in technology. (The International Convention for the Prevention of Pollution from Ships (MARPOL) 1973 is a convention falling within this category.) States may consider it prudent to wait until the detailed requirements, and hence their prospective detailed obligations, have been

settled and until the necessary technical advances have been realised before ratifying.

6. Equally some conventions may necessitate extensive changes which take time to effect—structural alterations to ships; the installation of equipment on ships; the survey of ships; the provision of reception facilities on shore for oily wastes; the introduction of revised training courses. States may consider it prudent to make progress with these changes before ratification in order to ensure compliance with their obligations under the convention when it comes into force.

7. In the case of the United Kingdom it is also necessary to determine to what extent ratification should extend to the dependent territories, the Channel Islands and the Isle of Man.

8. Finally, it is undoubtedly true that the speed of ratification of a particular convention depends on the priority attached to that step by the state concerned.

*Conventions, etc not ratified by the United Kingdom*

9. The United Kingdom has ratified twenty-four of the twenty-nine conventions, etc falling within the purview of the Maritime Safety Committee and the Marine Environment Protection Committee of the Intergovernmental Maritime Consultative Organisation (IMCO).

10. The current position on the remaining five is as follows:—

(a) *MARPOL 1973 and the 1978 Protocol thereto*. MARPOL 1973 presupposed significant technical advances, particularly as regards the procedures and arrangements for discharges from chemical tankers, and left a great deal of work to be done on developing detailed technical requirements and specifications. The 1978 Protocol modified MARPOL 1973, adding new requirements relating to oil tankers, and reducing one important obstacle to ratification by introducing a three-year time lag between the entry into force of the requirements for oil tankers and the entry into force of the requirements for chemical tankers. Substantial progress has been made internationally on 'fleshing out' the MARPOL framework, and has now reached a stage when ratification by the United Kingdom is under consideration. Ratification by June would be consistent with the target date for entry into force of June 1981 agreed in IMCO in February 1978.

(b) *The 'Torremolinos' International Convention for the Safety of Fishing Vessels 1977*. The dependent territories and the British Islands have been consulted on the question of whether the Convention should be extended to them. The last reply was received this month. A decision on ratification is expected in a matter of weeks.

(c) *The International Convention on Standards of Training Certification and Watch-keeping for Seafarers 1978*. Introducing a new structure of examinations and certification is a lengthy business because students need time to prepare themselves. A new structure will come into operation in the United Kingdom in September 1981 which, with minor amendments, will comply with requirements of the Convention. The minimum period of grace between ratification and entry into force is one year. It would therefore be imprudent to ratify much before September 1980. This would be consistent with the Recommendation adopted by the European Community.

(d) *The International Convention on Maritime Search and Rescue 1979*. Consultation with the dependent territories and the British Islands is at an



advanced stage. A decision on ratification is expected within the next few weeks. . . . (*Parliamentary Papers*, 1979–80, House of Commons, Paper 757, pp. 26–7.)

**Part Six: II. A. *Treaties—observance, application and interpretation—observance***

In reply to the question what action Her Majesty's Government had taken under the Washington Convention on International Trade in Endangered Species in respect of the rhinoceros, the Government Minister, Lord Mowbray, stated:

. . . the rhinoceros is already listed on Appendix I of the convention as being in danger of extinction. Commercial trade in it and its readily recognisable parts and derivatives should therefore have stopped in and between states party to the convention. Since not all party states enforce controls on by-products to the same degree, usually due to differing views on what is readily recognisable, the United Kingdom, with Switzerland and the Federal Republic of Germany, prepared a list of parts and derivatives, including rhinoceros horn, which all parties would be expected to control. This was considered by the convention at its meeting in Costa Rica last March, but was not adopted. The United Kingdom has prohibited imports and exports of rhinoceros and their horns since 1976, except where otherwise permitted under the convention.

. . . there is every worry about the rhinoceros. Live ones have only been licensed for import for breeding purposes in this country in accordance with the terms of the Washington Convention on International Trade in Endangered Species. Rhinoceros horns and skulls have only been allowed in for non-commercial purposes where they were already in ownership before 1976. (H.L. Debs., vol. 404, cols. 437–9: 23 January 1980.)

In reply to a question, the Government Minister, Lord Trefgarne, stated:

. . . we have made clear to the Soviet Union the importance that we attach to the full implementation by all signatory Governments of all parts of the Helsinki Final Act, and that we view with particular concern the imprisonment and persecution of people who have attempted to monitor its performance. (H.L. Debs., vol. 407, col. 1260: 1 April 1980.)

In reply to a question, the Secretary of State for Foreign and Commonwealth Affairs wrote:

Several aspects of Soviet preparations for the Moscow Olympics—for example, recent arrests of dissidents and other measures to limit contacts between Olympic visitors and Russians—are contrary to the Helsinki Final Act. Soviet implementation of many provisions of the Final Act has been wholly inadequate, and there is no sign of any improvement either in the Olympic or other contexts. (H.L. Debs., vol. 408, cols. 108–9: 14 April 1980.)

**Part Six: II. D. *Treaties—observance, application and interpretation—treaties and third States***

On 28 November 1980 the representative of the European Economic

Community (which includes the United Kingdom) made the following intervention during the debate in the Sixth Committee of the General Assembly of the United Nations on the subject of the International Law Commission's draft articles on most-favoured-nation clauses:

. . . it would not be consistent with very clear and well established international practice that a State which is not a member of a customs union, or is not included in a free-trade area arrangement should be entitled, on the basis of a most-favored-nation clause, to be granted special benefits accruing to the members of a customs union or parties to a free-trade agreement. A customs union or a free-trade area agreement is a form of far-reaching cooperation which, on the other hand, entails far-reaching obligations for the parties involved, in exchange for the rights that they grant each other.

It should also be mentioned that the contracting parties to a treaty containing a most-favored-nation clause do not normally intend the clause to be applicable to benefits which either of them might subsequently grant to another party in connexion with the establishment of a customs union or a free-trade area. The necessary exception for such cases is a generally accepted customary rule in international law, based on legal writing as well as on general agreement of the States and their unanimous practice. This situation must be expressly covered by the draft articles. (Text provided by the Foreign and Commonwealth Office; for earlier written observations of the United Kingdom and the European Economic Community see Document A/35/203 of the United Nations General Assembly.)

The United Kingdom delegate, Mr. D. H. Anderson, stated in the same debate:

Many developing countries, as well as developed countries, belong to customs unions or free-trade areas. Countries participating in such arrangements could not be obliged by mfn clauses to extend to third States facilities which are integral parts of the customs union or free trade area. For these reasons, we continue to regard the draft articles prepared by the ILC as containing a major gap which needs to be filled in the manner suggested by the European Community this morning. (Text provided by the Foreign and Commonwealth Office.)

### **Part Seven: II. B. *Personal jurisdiction—exercise—military jurisdiction***

In reply to the question why the British dependency of Diego Garcia was excluded from the list of dependent territories to which the Iran sanctions measures apply, the Minister for Trade wrote:

The British Indian Ocean Territory was not included in the application of the Iran (Trading Sanctions) Order because it has no permanent population or export trade. Almost all the temporary inhabitants on Diego Garcia are military personnel who are subject either to United Kingdom law by virtue of the Naval Discipline Act 1957 or to United States law (under both of which the relevant prohibitions would apply). (H.C. Debs., vol. 986, Written Answers, col. 12: 9 June 1980.)

**Part Eight: II. A. State territory and territorial jurisdiction—territorial jurisdiction—territorial sovereignty**

(See also Part Three: I. C. 4., *supra*.)

In reply to a series of questions, the Parliamentary Under-Secretary of State, Department of Defence, wrote:

The British military bases in Cyprus are on British territory. Their cost is borne on the United Kingdom budget.

The sovereign base areas are British sovereign territory which were retained for military use when the Republic of Cyprus was established in 1960. Being British territory no fees or rents are payable to the Republic for their use.

The sovereign base areas are British sovereign territory and no consultations with the Cyprus Government about their military use by British forces is required. (H.C. Debs., vol. 977, Written Answers, cols. 235-6: 23 January 1980.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

British sovereignty over the island of Rockall is not in dispute with the Republic of Ireland. (H.C. Debs., vol. 977, Written Answers, col. 501: 28 January 1980.)

In reply to a written question, the Lord Privy Seal stated that it was not the policy of Her Majesty's Government to withdraw from the sovereign base areas in Cyprus (H.C. Debs., vol. 977, Written Answers, col. 767: 31 January 1980; see also *ibid.*, vol. 982, col. 992: 15 April 1980).

In reply to a question, the Secretary of State for Defence wrote:

Spitzbergen is demilitarised by the Treaty of Paris of 1920, which recognises Norwegian sovereignty and also allows the Soviet Union, in common with all the Treaty signatories, freedom of access to carry out commercial and economic activities. The Soviet Union currently operates two coalmines in Spitzbergen. (H.C. Debs., vol. 978, Written Answers, col. 568: 12 February 1980.)

In the course of a debate in the House of Lords on the political and economic situation in Cyprus, the Government Minister, Lord Trefgarne, stated:

There is no present intention to give up any part of these bases. Nor is there any question of our having failed to meet our obligations over them. The bases are in fact sovereign territory. They are not rented . . . (H.L. Debs., vol. 405, cols. 794-5: 20 February 1980.)

In a communication to the Swiss Government dated 5 March 1980, the Government of the United Kingdom referred to the declaration made by the Government of the Argentine Republic on ratifying certain Acts of the Universal Postal Union (see Cmnd. 7949, p. 28) and made the following statement:

The Government of the United Kingdom of Great Britain and Northern Ireland have no doubt as to United Kingdom sovereignty over the Falkland Islands, the Falkland Islands Dependencies, and the British Antarctic Territory. In this



context attention is drawn to Article IV of the Antarctic Treaty, to which both the United Kingdom and Argentina are parties, which freezes territorial claims in Antarctica. The United Kingdom Government therefore do not accept the declaration of the Argentine Republic claiming that the Falkland Islands, South Georgia, the South Sandwich Islands and 'Argentine Antarctica' form part of Argentine territory, nor do they accept the declaration of the Argentine Republic concerning Article 25, para 1, of the Universal Postal Convention. (Cmnd. 8090, pp. 22-3.)

In the course of a statement on the subject of Gibraltar, following a joint Anglo-Spanish statement of 10 April 1980, the Lord Privy Seal, Sir Ian Gilmour, remarked:

the Anglo-Spanish statement reaffirms the Government's commitment never to enter into arrangements under which the people of Gibraltar would pass under the sovereignty of another State against their freely and democratically expressed wishes. (H.C. Debs., vol. 982, col. 800: 14 April 1980.)

Later in the debate on the Minister's statement, he said:

. . . the Spanish Government stated in the agreed text that they believed that Gibraltar was part of the territorial integrity of Spain. . . . we do not take that view. (Ibid., col. 801.)

In the course of answering questions on the subject of the Falkland Islands and the Falkland Island Dependencies, the Minister of State, Foreign and Commonwealth Office, Mr. Nicholas Ridley, stated:

We do not have a claim to the dependencies, we have sovereignty over them. (H.C. Debs., vol. 984, col. 1478: 14 May 1980.)

In reply to a question, the Government Minister in the House of Lords, Lord Trefgarne, stated:

. . . the sovereign base areas are not on the territory of the Republic of Cyprus. They are sovereign British territory. No fees or rent are payable for their use. (H.L. Debs., vol. 409, col. 1027: 22 May 1980.)

In reply to a question which asked, *inter alia*, whether the Convention for the Conservation of Antarctic Marine Living Resources recently concluded at Canberra had any effect on British sovereignty over the Falkland Islands and their dependencies, the Minister of State, Foreign and Commonwealth Office, wrote in part:

The Falkland Islands and their waters lie entirely outside the scope of the convention. It does apply to the waters around the Dependencies (South Georgia and South Sandwich) but it has no effect on British territorial sovereignty there. (H.C. Debs., vol. 985, Written Answers, col. 866: 5 June 1980.)

In the course of his reply to a question inquiring about the outcome of talks on the subject of the Falkland Islands between the Minister of State, Foreign and Commonwealth Office, Mr. Nicholas Ridley, and the

Under-Secretary of State at the Argentine Ministry of Foreign Affairs, held in New York on 28 and 29 April, the Government Minister, Lord Trefgarne, remarked:

We made clear that we remained convinced of our sovereignty. (H.L. Debs., vol. 410, col. 566: 12 June 1980.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The Sovereign bases remained British territory when the rest of the island of Cyprus was transferred to the sovereignty of the Republic of Cyprus under the treaty of establishment. The British Government continue to consider the 1960 treaties as valid. (H.C. Debs., vol. 988, Written Answers, col. 143: 8 July 1980.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

Her Majesty's Government have no doubt about British sovereignty over the Falkland Islands and Dependencies. This has been made clear to the Argentines on many occasions. (H.C. Debs., vol. 989, Written Answers, col. 855: 1 August 1980.)

In reply to a question on the subject of alleged threats by Ethiopia to use lethal nerve gas on dissidents in Eritrea, the Lord Privy Seal wrote:

Since Eritrea is recognised internationally as an integral part of Ethiopia, there is no case for questioning this in the United Nations. (H.C. Debs., vol. 991, Written Answers, col. 629: 6 November 1980.)

In the course of a debate on the subject of foreign affairs and defence, the Secretary of State for Foreign and Commonwealth Affairs, Lord Carrington, remarked of the Falkland Islands:

Her Majesty's Government have no doubt about our sovereignty over the islands . . . (H.L. Debs., vol. 415, col. 191: 26 November 1980.)

In the course of a debate in the House of Lords on the subject of the Falkland Islands, the Secretary of State for Foreign and Commonwealth Relations, Lord Carrington, remarked:

. . . over a great many years the Argentinians have claimed the Falkland Islands. We of course do not admit that claim . . . (H.L. Debs., vol. 415, col. 199: 27 November 1980.)

In reply to a question, the Lord Privy Seal wrote:

The British Government are in no doubt about the United Kingdom's sovereign rights over the Falkland Islands and the Falkland Islands Dependencies. (H.C. Debs., vol. 994, Written Answers, col. 201: 27 November 1980.)

In the course of a statement on the subject of the Falkland Islands, the Minister of State, Foreign and Commonwealth Office, Mr. Nicholas Ridley, remarked:

We have no doubt about our sovereignty over the islands. The Argentines, however, continue to press their claim.

... I ... visited the islands between 22 and 29 November in order to consult island councillors and subsequently, at their express request, all islanders, on how we should proceed. Various possible bases for seeking a negotiated settlement were discussed. These included both a way of freezing the dispute for a period or exchanging the title of sovereignty against a long lease of the islands back to Her Majesty's Government. (H.C. Debs., vol. 995, cols. 195-6: 2 December 1980; see also H.L. Debs., vol. 415, col. 342: 2 December 1980.)

In the course of replying to a question on the future of the island of Diego Garcia, the Government Minister, Lord Trefgarne, stated:

As to the sovereignty of Diego Garcia, the position is quite clear. The United Kingdom has full sovereignty over that island. (H.L. Debs., vol. 415, col. 390: 3 December 1980.)

In the course of a reply, the Minister of State, Foreign and Commonwealth Office, Mr. Nicholas Ridley, wrote:

I met an Argentine delegation for wide-ranging and exploratory talks on the Falkland Islands dispute in April. I reaffirmed that Her Majesty's Government have no doubt about British sovereignty over the Islands. (H.C. Debs., vol. 996, Written Answers, col. 179: 16 December 1980.)

In the course of a debate on the subject of the Falkland Islands, the Minister of State, Foreign and Commonwealth Office, Mr. Nicholas Ridley, stated:

At the talks in New York in April I protested again to the Argentine Foreign Minister about the presence of the Argentine mission on Southern Thule without the permission or consent of the British Government. (H.C. Debs., vol. 996, col. 996: 18 December 1980.)

With regard to a petition dated 12 November 1980 from citizens of the United Kingdom concerning alleged violations of human rights in Eritrea, the Lord Privy Seal made in part the following written observation dated 16 December 1980:

Eritrea was established in 1952 as an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown following upon Resolution 390A(V) adopted on 2 December 1950 by the United Nations General Assembly. On 14 November 1962 the Eritrean Assembly in formal session accepted the Ethiopian proposal to end the federation and to bring Eritrea into union with Ethiopia. The union was internationally accepted. As a result there is no case for questioning this in the United Nations. (Supplement to the Votes and Proceedings of the House of Commons: 19 December 1980.)

**Part Eight: II. C. State territory and territorial jurisdiction—territorial jurisdiction—concurrent territorial jurisdiction**

In reply to a letter from a member of the public requesting the United



Kingdom Government's position on the continued imprisonment of Rudolf Hess in Spandau Prison, Berlin, the Foreign and Commonwealth Office wrote on 25 January 1980:

The Government believes that Hess was properly convicted by the Nuremberg Tribunal; but for the past 13 years successive British Governments have taken the view, along with the Governments of France and the United States, that the time has come to release Hess immediately on humanitarian grounds. However, all matters relating to the conduct of the Tribunal and the carrying out of its sentences are subject to the provisions of Agreements reached by the Four Powers who conducted the Tribunal. As you know, Hess was sentenced to life imprisonment. Any change in that sentence would need Four Power consent. Despite frequent high level appeals from the Western Governments, the Russians have refused to agree to release Hess.

For the British Government unilaterally, or for the three Western Powers jointly, deliberately to breach a binding international Agreement would be a serious step with damaging implications for the conduct of relations between states. More specifically, such action would call into question other Four Power Agreements, including those which form the legal basis for the continued existence in freedom and security of West Berlin and its two million inhabitants. The fact that West Berlin remains free cannot be divorced from the fact that, since the end of the war, the Western Powers have scrupulously observed all Agreements relating to Berlin and Germany which they reached with the Russians. (Text provided by the Foreign and Commonwealth Office.)

On 7 October 1980, the British Military Government in Berlin released the following statement:

East German military units participated in a demonstration in Berlin today. Their equipment included 38 main battle tanks, 64 armoured fighting vehicles, 19 rocket carrying vehicles, 53 rocket launchers and 49 pieces of artillery. The Allied Commandants condemn the repetition of such illegal East German military displays which violate the demilitarised status of Greater Berlin. (Text provided by the Foreign and Commonwealth Office.)

**Part Eight: II. D. *State territory and territorial jurisdiction—territorial jurisdiction—extra-territoriality***

In moving the second reading in the House of Lords of the Protection of Trading Interests Bill, the Lord Advocate, Lord Mackay of Clashfern, stated:

I am moving today the Second Reading of a Bill which deals with matters which are of the greatest importance to the interests of the United Kingdom as an international trading nation. The objective of this Bill is to improve the defence of the United Kingdom against attempts by other countries to enforce their economic and commercial policies outside their own territories.

The problem was recognised as long ago as 1964 in relation to international shipping and the Shipping Contracts and Commercial Documents Act of that year introduced a measure of protection in relation to shipping. Since then the

problem has spread to many other areas of trade, as I shall show briefly. In theory this is a problem which could arise generally since many countries have policies which they might seek to enforce beyond the normal bounds of national jurisdiction as recognised in international law. However, the practices to which successive United Kingdom Governments have taken exception have arisen almost entirely . . . from the United States of America. That powerful friend and ally has over several decades been developing a policy of enforcing its economic rules outside its own jurisdiction, in a manner which has become even more acutely difficult for us over the last few years.

The Government recognise that the United Kingdom bears a heavy responsibility in the maintenance of the open international trading system in what is an increasingly interdependent trading world. We have to maintain the principle of enterprise and competition between undertakings within individual nations, and between trading nations themselves. At the same time, the increasing volume of international trade, the swiftness of modern communications, the international nature of many enterprises and increasing specialisation on the part of industrial nations mean that, while trading nations are interdependent in a real sense, their economic and commercial policies are bound sometimes to come into conflict.

We recognise this, and we believe that the right way to sort out the resulting differences of policy and approach is by inter-governmental discussion and negotiation through the established international organisms by which trade policy is co-ordinated, as well as in bilateral contacts and negotiations between Governments. Only where the results of discussion and negotiation are unsatisfactory do we have to fall back upon the basic principle limiting the extent to which a country's jurisdiction is recognised in international law.

The United States has over the last three decades shown a tendency increasingly to try to mould the international economic and trading world in its own image. This is an attitude not only of the United States legislature, but it is shared by its courts and its enforcement agencies, all of whom have contributed to the matters to which we take objection. By this I mean that there are certain well-established and deeply held principles in United States economic thought and law which they are well entitled to enforce rigorously within their own jurisdiction, but which, no doubt from the best of motives, they have increasingly sought to impose on their trading partners elsewhere in the world. Pre-eminently this happens in the field of anti-trust, but, as I shall explain later, there are several other areas in which the United States seeks to impose its own law or concept of good practice on others.

I turn first to the anti-trust field, in which our differences with the United States have been wide-ranging and have affected such different and, to us, such important trading interests as oil, platinum and uranium, aviation and book-publishing as well as shipping. Since this field is perhaps the most important illustration of our difficulties, perhaps your Lordships would bear with me if I concentrate on it for a few minutes.

The basic anti-trust statute is the Sherman Act which, as your Lordships will know, was passed in 1890. That Act is based upon broad policies outlawing restraints of trade in very general terms. It has been amended from time to time—for example, by the Clayton Act in 1914—and has, of course, been considerably developed by the process of judicial interpretation. The legislation provides for criminal offences and also for civil actions for damages, in which the sum awarded

is three times the amount of damage suffered in consequence of the breach of the statute. If this legislation was applied only to activities within the United States we could have no reasonable objection, and this was the extent to which the legislation was originally enforced.

By 1945, however, the United States view of its position in the world had affected the attitude of the United States courts. In a case generally known as the *Alcoa* case, involving a Canadian and five European aluminium producers who had joined together to allocate the amount of aluminium to be produced, the United States alleged that there had been an effect on the price of aluminium in the United States of America. A quorum of the Supreme Court could not be obtained and, therefore, a special statutory court was set up. In giving the judgment of that court, Judge Learned Hand stated, 'That any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the State reprehends'. This is the 'effects doctrine' and it has been applied and extended not only by the United States courts in relation to the granting of court orders, but also by the regulatory authorities in relation to action outside the courts.

In the application of this doctrine, the United States courts and agencies pay comparatively little attention to the interests of foreign states, unless the acts in question are mandatory under the law of those states. Although in some recent cases the United States courts have shown an awareness of the international implications of their claims to jurisdiction, and have expressed a willingness to take into account the domestic policies of other countries, it is highly doubtful whether there is any real change in the rule they apply.

As I have said, the Acts are enforced not only by criminal sanctions in the ordinary way, but they also confer a right to treble damages on parties claiming to be injured by them. We regard these civil actions as being penal in character, rather than compensatory. The United States Government itself, in a note to Her Majesty's Government about the Bill, a copy of which is in your Lordships' Library, has stated that, 'The private treble damage action acts as a deterrent to illegal activity in the same manner as governmental enforcement and provides an incentive to victims to act as private Attornies General'. This possibility of concurrent criminal and civil penal proceedings introduces a clear element of double jeopardy, and in civil proceedings the plaintiff will be acting, as the United States Government has pointed out, not with the quasi-judicial discretion of a prosecuting authority, but in his own financial interest.

These civil proceedings are not subject to any of the limitations we would regard as appropriate to criminal proceedings, whether in the course of the proceedings themselves or to the eventual penalty. For example, the defendant need not be present in the United States. Whether or not he appears, he is subject to wide-ranging discovery of documents. Failure to appear is deemed to involve an admission of the plaintiff's pleaded facts or, in other words, to be an admission of guilt. The United States system of class actions and the contingency fee method of payment to lawyers combine to facilitate the bringing of these actions.

Our objection to excessive United States claims to jurisdiction and to United States practices in this field are long-standing and sustained. In the early 1950s Her Majesty's Government intervened in a case involving the major British oil companies. In 1959 we discussed our differences at a meeting between the two Attorneys-General. This was followed in 1960 by formal discussions in



Washington, at which I understand the Noble and Learned Lord, Lord Wilberforce, was present. Discussions and representations have continued ever since, but to limited effect, although I should like to record with gratitude that the United States Government, bound as it is by the tight rules of its own law, has at least managed to help us in giving advance notice of investigations which might concern us.

As I said, this matter first attracted the attention of Parliament in relation to shipping, and shipping continues to be much affected by these difficulties. Only recently two of our shipping lines operating in the North Atlantic were very heavily fined and now face treble damage proceedings arising from the same matters. But, as I said, the problem is by no means confined to shipping. Let me give just one further illustration. This is an illustration only, but an extremely good one. In 1964, when the United States uranium mining industry was threatened by foreign imports, it was afforded long-term protection by means of an effective ban on the import of uranium for use in United States reactors. This had the immediate effect of denying to the non-United States producers about three-quarters of the world market for uranium. During the late 1960s and early 1970s Westinghouse, the USA's biggest power engineering company, concluded a number of contracts relating to the construction of nuclear power stations in which they agreed to supply future quantities of uranium, but did not take the precaution of buying forward to cover those commitments.

Following a large and unexpected increase in the price of uranium after 1973, Westinghouse found themselves in serious difficulties and, in September 1975, they gave notice that their uranium supply contracts had become 'commercially impracticable', blaming the large oil price rise in 1973 and the 'actions of foreign uranium producing countries and companies that have significantly curtailed international uranium supplies' as the cause. This led to Westinghouse being sued by the public power utilities. The total amount of compensation claimed was in the region of two billion dollars. It was an attempt by Westinghouse to obtain from RTZ evidence in these proceedings which led to the *Westinghouse v. RTZ* appeal in your Lordships' House in 1977.

Westinghouse, in their turn, took this figure as the basis for a treble damages anti-trust claim against the uranium producers, brought in Illinois. This latter case is still going on. The action of the non-United States uranium producers was in any event fully supported by the Governments of the uranium producing countries involved and was a direct result of the earlier United States protectionist embargo. It appears quite unreasonable that a United States company should now be able to bring United Kingdom and other non-United States companies before a United States court in order to obtain massive damages multiplied threefold, and thus involving considerable enrichment, for activities by non-United States companies outside the United States at a time when they were denied access to the United States market. I hope the House will agree that whether it be shipping, uranium, or any other trading activity that is affected, no Government can stand by and allow companies vital in our trading structure to be threatened in this way when we contest the very basis of the United States action.

But the anti-trust Acts are not the only cause of contention between ourselves and the United States. There are many agencies which have criminal or civil powers in the execution of the duties laid on them by the United States Congress. These powers may lead them on occasion to pursue inquiries or launch

proceedings against persons who, according to the conception of international law to which we adhere, are outside the jurisdiction of the United States and in relation to which successive Governments have been obliged to intervene on behalf of our traders. These agencies include the Federal Trade Commission, the Securities and Exchange Commission, the Federal Maritime Commission, and others.

In all these fields the Americans regard it as appropriate that they should exercise unilateral control over any activity which has an effect on United States commerce, whether domestic or foreign, and we have the same objections as we have in relation to the anti-trust Acts. Our objections are not theoretical. For example, we have to take exception to an investigation by the Securities and Exchange Commission relating to the activities outside the United States of a major United Kingdom company. The claimed jurisdictional basis for the inquiry is solely that depository receipts based on United Kingdom-held shares of the company were being dealt in in the United States. The company itself was in no way a party to these arrangements.

A third objectionable practice on the part of the United States is that it from time to time treats companies in which United States citizens hold a number of shares—not even enough to make the companies subsidiaries of United States companies—as being for that reason subject to United States jurisdiction. An example can be found in regulations made under the Export Administration Act 1979, which treat a non-United States company in which there may be as little as a 25 per cent. United States interest as ‘controlled in fact’, and therefore as an American company for the purpose of the Act. Such companies are required to behave in certain ways, including providing information under the regulations. The requirements could well be prejudicial to the commercial and economic policies of the countries in which these companies are incorporated and do business, and the United States claim to jurisdiction and control over them is, in our view, entirely unjustified.

Therefore, in the light of the recent intensification of the problems which I have just outlined, we hold strongly that it is time for the United Kingdom to take what action is open to us, not to undermine the legal system of a friendly country, nor to attack the exercise of jurisdiction by the country within its own borders, but to protect the legitimate economic and trading interests of our own country. This will in no way prejudice the friendship and co-operation we enjoy in so many other spheres.

I should observe in passing that the United Kingdom is far from alone in objecting to the approach of the United States in these matters. Over the years and on different occasions some 20 Governments of other countries, including the United Kingdom, have protested to the United States of America about what was seen as the unacceptable exercise of jurisdiction. We know of many countries which have powers to control or block the passing of information to authorities of other countries.

In considering what steps we could and should take in practice, we mainly built on the existing powers in the Shipping Contracts and Commercial Documents Act 1964, to which I have referred. First, it appeared appropriate to have wide power to prohibit compliance by persons in the United Kingdom with objectionable United States and other foreign measures. In this respect, Section 1 of the 1964 Act applied only to shipping in limited circumstances and we propose

that it should be re-enacted in a much wider form. In practice, one of the most objectionable aspects of United States regulatory activities has been wide requirements to produce documents.

Section 2 of the 1964 Act has been reasonably effective here but time has shown that it was not wide enough. We have reached the conclusion that we should be able to control the production of documents from the United Kingdom in any circumstances except those in which, if the application were made through our courts, those courts would order production under the Evidence (Proceedings in other Jurisdictions) Act 1975 as a matter of course. (H.L. Debs., vol. 404, cols. 554-61: 24 January 1980.)

In reply to the question whether adequate provision exists in United Kingdom law to enable courts to try cases brought under the extra-territorial provisions of the European Convention for the Suppression of Terrorism and of the Protocol thereto, signed in Dublin in December 1979, the Minister of State, Home Department, wrote:

Yes. Section 4 of the Suppression of Terrorism Act 1978 confers on United Kingdom courts the jurisdiction required by article 6 of the European Convention on the Suppression of Terrorism. The jurisdictional obligations of the agreement concerning the application of the European Convention on the Suppression of Terrorism among the member states of the European Communities are those of the European Convention itself. Section 4 of the 1978 Act would therefore enable the United Kingdom also to meet these obligations when the agreement enters into force. (H.C. Debs., vol. 977, Written Answers, col. 641: 30 January 1980.)

In reply to a question about progress on the negotiation of a convention with the United States on the reciprocal recognition and enforcement of judgments in civil matters, the Lord Chancellor wrote:

A substantial proportion of the bodies which commented on the Consultative Paper felt that a Convention might be harmful in view of the very high damages awarded by American juries, especially in personal injury and product liability cases; and that it would not be possible to devise any means of mitigating the enforcement of such judgments which would not be excessively difficult to operate in practice. Taking these and other views into consideration, Her Majesty's Government have decided not to pursue negotiations on a draft Convention, and have so informed the United States authorities. (H.L. Debs., vol. 410, col. 1864: 26 June 1980; see also H.C. Debs., vol. 987, Written Answers, cols. 267-8: 26 June 1980.)

In reply to a question inquiring about the operation of the Criminal Jurisdiction Act 1975 as regards crimes committed in Northern Ireland and the Republic of Ireland, the Secretary of State for Northern Ireland wrote:

Proceedings under the extra-territorial legislation are a matter for the prosecuting authorities in whose jurisdiction the suspect is. In deciding whether to prosecute, account is taken of all the available evidence from both the RUC and the Garda Síochana. Since 1 June 1976, when the extra-territorial legislation came into



force, there have been two successful prosecutions: in one case three persons were convicted in Northern Ireland in December 1978; in the other one person was convicted in the Republic in April 1978. (H.C. Debs., vol. 986, Written Answers, cols. 550-1: 18 June 1980.)

In reply to the question what arrangements existed between the United Kingdom and other member States of the E.E.C. for the reciprocal enforcement of maintenance orders, the Minister of State, Home Department, wrote:

The United Kingdom operates arrangements for the reciprocal recovery of maintenance with all the member States of the European Community. There is a bilateral agreement with the Republic of Ireland in accordance with which maintenance orders are transmitted and enforced under the Reciprocal Enforcement of Maintenance Orders (Republic of Ireland) Order 1974 (SI 1974 No. 2140). Arrangements with the other member States are operated in accordance with the United Nations Convention on the Recovery Abroad of Maintenance: claims for maintenance are transmitted, determined and enforced in the United Kingdom under part II of the Maintenance Orders (Reciprocal Enforcement) Act 1972. In addition, the United Kingdom and France are parties to the Hague Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations, in accordance with which maintenance orders may be transmitted and enforced under the Reciprocal Enforcement of Maintenance Orders (Hague Convention Countries) Order 1979 (SI 1979 No. 1317). (H.C. Debs., vol. 987, Written Answers, col. 573: 2 July 1980.)

**Part Eight: IV. *State territory and territorial jurisdiction—regime under the Antarctic Treaty***

In reply to questions about the draft Convention for the Conservation of Antarctic Marine Living Resources, the Minister of State, Foreign and Commonwealth Office, wrote:

The convention, as drafted, will be an effective conservation measure so long as the States involved develop any fishery cautiously within the convention framework. Ties with the Antarctic Treaty ensure that the States active in the area are subject to similar obligations. We do not regard the membership and voting provisions as weaknesses in the convention. (H.C. Debs., vol. 983, Written Answers, col. 704: 2 May 1980.)

In the course of a debate in the House of Lords on the subject of the conservation of Antarctic marine living resources, the Government Minister, Lord Trefgarne, stated:

Twelve countries, including the United Kingdom, the United States, and the Soviet Union, were original signatories of the treaty, and 10 have subsequently acceded. The régime established by the treaty has been remarkably successful—this has been commented on by several noble Lords—and the area is currently a demilitarised continent devoted to scientific research. The consultative meetings have led to a series of international agreements to conserve the environment of the area; notably the agreed measures for the Conservation of Antarctic Flora and

Fauna (in 1964) and the Convention for the Conservation of Antarctic Seals (in 1972). It is noteworthy also that the convention so recently concluded in Canberra owes its origin to a recommendation made at the Ninth Consultative Meeting of the Antarctic Treaty powers in London in 1977. In all these developments, as in the formulation and negotiation of the Antarctic Treaty itself, the United Kingdom played a leading part. (H.L. Debs., vol. 409, col. 998: 21 May 1980.)

In reply to the question *inter alia* whether the Convention for the Conservation of Antarctic Marine Living Resources recently concluded in Canberra involved an extension of the Antarctic Treaty to the Falkland Islands and their dependencies, the Minister of State, Foreign and Commonwealth Office, wrote in part:

The convention does not extend the Antarctic Treaty. The Falkland Islands and their waters lie entirely outside the scope of the convention. (H.C. Debs., vol. 985, Written Answers, col. 866: 5 June 1980.)

**Part Nine: I. A. Seas, waterways—territorial sea—delimitation**

In reply to the question whether Her Majesty's Government proposed to extend the maritime territorial limit to 12 miles, the Minister of State, Foreign and Commonwealth Office, wrote:

The Government are keeping under review the desirability of an extension of the United Kingdom's territorial sea in the light of developments at the United Nations Law of the Sea Conference. (H.C. Debs., vol. 996, Written Answers, col. 182: 16 December 1980.)

**Part Nine: I. B. 1. Seas, waterways—territorial sea—legal status—right of innocent passage**

In the course of its observations on the Second Report from the Expenditure Committee of the House of Commons on measures to prevent collisions and strandings of noxious cargo carriers in waters around the United Kingdom, the Government wrote:

It is generally accepted that a State has the right to intervene in its territorial sea. Consequently there was no need for the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969—which authorises measures which are necessary to combat 'grave and imminent' dangers rather than 'any action'—to apply to those waters. The Prevention of Oil Pollution Act 1971 and the Oil in Navigable Waters (Shipping Casualties) Order (SI 1971 No 1736) provide the statutory basis for intervention in our territorial sea and on the high seas. (Cmnd. 7525, p. 21.)

**Part Nine: I. B. 4. Seas, waterways—territorial sea—legal status—warships**

In the course of a statement at the plenary meeting of the Third United

Nations Conference on the Law of the Sea, held on 26 August 1980, the leader of the United Kingdom delegation, Mr. J. E. Powell-Jones, remarked:

The granting to the coastal state of the power to make regulations requiring notification or authorisation of the passage of warships through the territorial sea is inconsistent with existing international law and unacceptable to the United Kingdom. (Text provided by the Foreign and Commonwealth Office.)

### **Part Nine: III. Seas, waterways—internal waters**

The Department of Trade provided the following note, dated 23 May 1980, to the Industry and Trade Committee of the House of Commons in preparation of its Third Report, being the follow-up to the Second Report by the former Expenditure Committee on measures to prevent collisions and strandings of noxious cargo carriers in waters around the United Kingdom:

#### TERRITORIAL SEA LIMITS IN LYME BAY

##### *Introduction*

1. This note, based on information supplied by the Hydrographic Department, Ministry of Defence, is submitted in response to the Committee's request at the meeting on 30 April with Mr Tebbit, Parliamentary Secretary, Department of Trade and officials from the Marine Division in that Department.

##### *Background*

2. The Territorial Waters Order in Council 1964 establishes the baseline from which the breadth of the territorial sea adjacent to the United Kingdom, the Channel Islands and the Isle of Man is measured. This generally is low-water line round the coast, including the coast of all islands.

##### *Application to Lyme Bay*

3. In general in this area the baseline is the low-water line along the coast, including the coasts of islands (eg Ore Stone off Torquay), and of low-tide elevations. The last named are features covered at high tide but above water at low tide, a few of which exist very close inshore around the bay.

4. Article 4 of the Territorial Waters Order in Council permits the use as baselines of straight lines drawn across the mouths of bays where the mouths are not more than 24 miles wide; lines up to 24 miles long may be drawn within bays the mouths of which are greater than 24 miles wide. There are also certain provisions concerning the use of islands in the entrance to a bay. The term 'bay', however, refers only to indentations of the coast which satisfy a rule that the area of water between the shore of the bay and a line drawn across its mouth exceeds the area of a semi-circle of the same diameter as the length of the line across the mouth. On the chart (attached), a line has been drawn between Portland Bill and Start Point (48.6 miles long), and it can be seen from inspection that the semi-circle constructed on it is of greater area than the area of water within Lyme Bay north of the line. Thus Lyme Bay as a whole cannot be treated as a 'juridical bay'.

5. In fact the only indentations that qualify as juridical bays as defined in the Order in Council and lying within the area are marked on the chart. These bays are Weymouth Bay, River Exe, River Teign, Tor Bay and River Dart. . . . (Parliamentary Papers, 1979-80, House of Commons, Paper 757, p. 46.)



**Part Nine: IV. Seas, waterways—straits**

In reply to the question what guarantees Her Majesty's Government had obtained from the riparian States in the Persian Gulf regarding the continued freedom of passage through the Straits of Hormuz for merchant ships of all nations, the Minister of State, Foreign and Commonwealth Office, wrote:

No specific guarantees have been offered or sought. The rules of international law clearly provide for the freedom of passage of ships of all nations through the Straits of Hormuz. (H.C. Debs., vol. 982, Written Answers, col. 640: 16 April 1980.)

In the course of a debate on the Iran–Iraq hostilities, the Secretary of State for Foreign and Commonwealth Affairs, Lord Carrington, stated:

The Straits of Hormuz are, of course, an international strait, and there can be no question that nobody has a right to close them. (H.L. Debs., vol. 413, col. 389: 8 October 1980.)

**Part Nine: VII. A. 1. Seas, waterways—the high seas—freedom of the high seas—navigation**

(See also Part Nine: X., *infra*.)

In a diplomatic note dated 11 July 1980, addressed to the Chairman of the Ad Hoc Committee on the Indian Ocean, the Permanent Mission of the United Kingdom to the United Nations made the following observations:

*Use of Indian Ocean by Vessels and Aircraft*

The arrangements to implement individual zones of peace must not, in the view of the Government of the United Kingdom, involve any derogation from navigational and other rights of states, including the freedom of the high seas. (Text provided by the Foreign and Commonwealth Office.)

**Part Nine: VII. B. Seas, waterways—the high seas—nationality of ships**

In the course of a debate in the House of Lords on the subject of maritime policy, the Lord Advocate, Lord Mackay of Clashfern, remarked, in respect of flags of convenience:

It is not clear to us that it has been demonstrated that flags of convenience are yet at the stage where they should be outlawed. In particular, we think it is unjustified to assert that United Kingdom oil companies have a policy of chartering substandard 'flag of convenience' ships, since all ships using United Kingdom ports are subject to the same safety standards, whatever their origin. (H.L. Debs., vol. 405, col. 839: 20 February 1980.)

In reply to a question, the Parliamentary Under-Secretary of State, Department of Trade, wrote:

The Government consider that, provided internationally-agreed safety and social

standards are fully observed, each nation should be free to set the economic criteria for the admission of vessels to its register. In discussion of flags of convenience within UNCTAD and OECD, the United Kingdom opposes any measures which would reduce competition in international shipping and raise the cost of international trade. (H.C. Debs., vol. 991, Written Answers, col. 378: 31 October 1980.)

**Part Nine: VII. C. *Seas, waterways—the high seas—hot pursuit***

In the course of a debate on the subject of maritime policy, the Lord Advocate, Lord Mackay of Clashfern, stated:

... this is the moment to refer to arrest by aeroplane . . . We think that international matters move slowly, but in the Convention on the High Seas of 1958, printed in Cmnd. 1929, it is provided that—‘hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft on government service specially authorised to that effect. . . . The aircraft giving the order to stop must itself actively pursue the ship until a ship or aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship.’ Even then, they contemplated the possibility of this happening. (H.L. Debs., vol. 405, col. 839: 20 February 1980.)

**Part Nine: VII. G. *Seas, waterways—the high seas—pollution***

In reply to the question whether steps would be taken to reduce the incidence of discharges of oily ballast at sea which resulted in the pollution of British beaches, the Parliamentary Under-Secretary of State, Department of Trade, wrote:

Under international law such discharges are, generally speaking, prohibited within 50 miles of land. It is our policy to prosecute whenever adequate evidence can be obtained and we have jurisdiction, and to report the facts to the flag State when we do not have jurisdiction. (H.C. Debs., vol. 996, Written Answers, col. 351: 18 December 1980.)

**Part Nine: VII. H. *Seas, waterways—the high seas—jurisdiction over ships***

In the course of a debate in the House of Lords on the subject of maritime policy, the Lord Advocate, Lord Mackay of Clashfern, stated:

It was suggested . . . that we should move towards port State jurisdiction as against flag state jurisdiction. This again is a matter that requires to proceed by international agreement if it is to be effective. The general view is that the flag State is in the best position to enforce standards when a ship is registered, and to continue to do so over time on a sustained and consistent basis, because there are obvious difficulties from the point of view of the port State in enforcing its standards. (H.L. Debs., vol. 405, col. 839: 20 February 1980.)

In the course of the debate on the third reading in the House of Commons of the Iran (Temporary Powers) Bill, the Minister of State, Foreign and Commonwealth Office, Mr. Douglas Hurd, stated:

There is no international law objection to a State assuming criminal jurisdiction

over ships . . . registered in its territory. (H.C. Debs., vol. 984, col. 1275: 13 May 1980.)

In the course of the Government's written observations on the Second Report from the Expenditure Committee of the House of Commons on measures to prevent collisions and strandings of noxious cargo carriers in waters around the United Kingdom, it was stated:

66. The Government believe that the primary responsibility for enforcement should remain with the flag State. The essence of becoming a party to an international agreement is giving an undertaking to apply the agreed standards to flag vessels, which implies a responsibility for enforcement. International action, as well as promoting uniform world-wide standards, therefore also spreads the burden of enforcement. The flag State is in the best position to confirm that the standards relating to safety and pollution control are met at the time of registration of the vessel. The flag State is likewise in the best position to enforce standards on a sustained basis and, where necessary, to obtain direct access to the owner of the vessel for proceedings to be taken against him.

67. The Government nevertheless agree that there is a complementary, and increasing, role for the port State (that is the country in whose port the vessel calls) to enforce agreed international standards. Indeed, the Safety of Life at Sea conventions and the International Convention for the Prevention of Pollution from Ships 1973 contain port State control provisions. The port State is already entitled to prosecute for breaches of discharge standards by a foreign flag vessel, as well as its own vessels, in its territorial sea. The Informal Composite Negotiating Text (ICNT) of the United Nations Law of the Sea Conference (UNLOSC) proposes a wide new power for the port State to prosecute a breach of applicable international discharge standards by a foreign flag vessel on the high seas. The Government support this addition to the jurisdiction of the port State.

68. The Government already have wide powers of inspection and some powers of detention over foreign flag vessels in United Kingdom ports. The Merchant Shipping Bill would permit the making of regulations providing for detention and prosecution of foreign flag vessels in United Kingdom ports to enforce the control provisions of international safety and pollution prevention agreements ratified by the United Kingdom, whether or not those agreements are yet in force.

...

69. The Government are, in general, opposed to giving the coastal State (that is the country whose shores the vessel is passing) enforcement rights against traffic navigating past its coast. Even leaving aside the United Kingdom's wider interests as a major maritime power, questions of practicality loom large when seeking to exercise such rights. There would be wide scope for irresponsible or capricious action, particularly if an ill-equipped State attempted to arrest a large vessel. This could only too easily lead to accidents resulting in loss of life or pollution. (Cmnd. 7525, pp. 16-17.)

In the course of a debate in the House of Lords on the subject of the prevention of oil spills in the North Sea, the Government Minister, Lord Lyell, remarked:

There has been discussion in close detail about the question of flag state and port



state enforcement and jurisdiction. The Government do not regard port state enforcement or jurisdiction as a substitute for, but rather as a complement to, flag state enforcement, because we believe that the flag state is generally best placed to enforce standards when a ship is built or registered . . . and, once the ship is built and registered, to continue that supervision on a regular, sustained and consistent basis, particularly as regards structural requirements.

To give an example: port states are unlikely to wish to put a passenger or cargo ship into dry dock for inspection, whereas the flag state is required to make an inspection annually under the International Convention for the Safety of Life at Sea 1974, to which I referred earlier. We believe that port states can help to maintain standards, not least by confirming that ships' equipment is still in full and effective working order. (H.L. Debs., vol. 410, cols. 1707-8: 25 June 1980.)

In reply to the question

What is standing in the way of the full application of port state jurisdiction over service vessels operating from British ports to British licensed installations on the United Kingdom continental shelf, or, alternatively, of their requiring licensee companies operating on the United Kingdom continental shelf to undertake that service vessels contracted to them will accept full British jurisdiction during the life of the contract,

the Government Minister in the House of Lords wrote:

It is a clear principle of international law that, save in exceptional cases, a ship on the high seas is subject to the exclusive jurisdiction of the flag state. Flag states are under an obligation to take effective measures to ensure safety at sea, with regard, *inter alia*, to the prevention of collisions; manning and labour conditions; and construction, equipment and seaworthiness.

Foreign supply boats operating from United Kingdom ports to installations on the United Kingdom's continental shelf subject themselves to United Kingdom jurisdiction while in United Kingdom ports in the same fashion as other foreign vessels, and we seek to exercise that jurisdiction in a manner appropriate to the context. Foreign ships may also subject themselves to United Kingdom law in certain respects by virtue of being engaged in operations for the exploration and exploitation of the United Kingdom's continental shelf; in this connection . . . attention is drawn to the Submarine Pipelines (Diving Operations) Regulations 1976, the Health and Safety at Work Act 1974 (Application outside Great Britain) Order 1977, and the Employment Protection (Offshore Employment) Order 1976 as amended.

Neither the rules of international law regarding jurisdiction over vessels nor the provisions of the applicable United Kingdom legislation are capable of being overridden by contract. (H.L. Debs., vol. 415, cols. 973-4: 15 December 1980.)

### **Part Nine: VIII. Seas, waterways—continental shelf**

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The question of the delimitation of the continental shelf between Ireland and the United Kingdom, including those areas which might be affected by Rockall, is

still being discussed between the two Governments. . . . British sovereignty over the island of Rockall is not in dispute with the Republic of Ireland. (H.C. Debs., vol. 977, Written Answers, col. 501: 28 January 1980.)

In reply to a further question on the same subject, the Minister of State later wrote:

At a further meeting of officials on 6 February, it was agreed that the delimitation of the continental shelf as between the United Kingdom and the Republic of Ireland should be submitted to an ad hoc arbitral tribunal of five members, subject to agreement between the two parties on the composition and terms of reference of that tribunal and related matters. (H.C. Debs., vol. 978, Written Answers, col. 466: 11 February 1980.)

In his opening statement at the Conference on the Conservation of Antarctic Marine Living Resources, held in Canberra, the leader of the United Kingdom delegation, Sir Donald Logan, remarked:

In approaching this Convention my Government has noted that international law on fishing, as reflected in widespread State practice, gives coastal states sovereign rights over the exploitation of the living resources of a zone up to 200 miles in breadth. In general, if the coastal state could not itself exploit these resources, it should allow other states access to the surplus under conditions which it imposes and through agreements which it concludes. My Government's willingness to join this Convention on living resources does not in any way derogate from the inherent and exclusive sovereign rights which coastal states are entitled to exercise for the purpose of exploring and exploiting the natural resources of the continental shelf appertaining to them under international law. (CAML/8, p. 2: 7 May 1980.)

In reply to the question

Whether they can confirm the assurance given in 1975 by the then Prime Minister to the Irish Taoiseach, Mr. Cosgrave, that no exploration of the waters round Rockall would take place without prior consultation with the Irish Government; and whether in view of the recent Woods McKenzie report, and the possibility of vast oil and gas reserves in the 7,000 square miles of the Shallow Rockall Bank, the precise claims to this area should not be established,

the Secretary of State for Foreign and Commonwealth Affairs wrote:

Her Majesty's Government are aware of no such assurance having been given in 1975. The delimitation of the continental shelf between the United Kingdom and the Republic of Ireland, which includes the area around Rockall, is the subject of discussions between the two Governments, and as my honourable friend the Minister of State for Foreign and Commonwealth Affairs said in another place on 11th February, the two Governments have agreed in principle to submit the matter to international arbitration. (H.L. Debs., vol. 411, cols. 1011-12: 7 July 1980.)

In reply to a question, the Secretary of State for Energy wrote:

An offshore production licence entitles the holder to explore for and produce oil and

gas in a specified area of the United Kingdom continental shelf. It does not confer any ownership rights over the reserves. (H.C. Debs., vol. 988, Written Answers, col. 348: 11 July 1980.)

In reply to a question asking Her Majesty's Government

Whether they have reached any agreement with the Government of Argentina on the demarcation of the boundary between the exclusive economic zones of the Falkland Islands and Argentina; whether they are aware that the Argentina state petroleum company (YPF) advertised in the 6th November *Herald Tribune* for tenders to drill for oil on the Magallanes Este Block, Tender No. 14048/80, and that this Block is well over the Falkland Islands side of any putative median line; and whether they will circulate a notice to all potential bidders making it clear that the United Kingdom does not recognise Argentina's sovereignty over this Block and will reserve its rights to take legal action for the recovery of damages against any company which drills there,

the Secretary of State for Foreign and Commonwealth Affairs wrote:

No agreement has been reached between the United Kingdom and Argentine Governments on the delimitation of the continental shelf as between the Falkland Islands and Argentina. In the absence of an agreed boundary, neither party, in Her Majesty's Government's view, would be entitled to exercise continental shelf rights beyond the median line between the Falkland Islands and Argentina. We have protested to the Argentines about the YPF tender which does indeed go beyond the median line. (H.L. Debs., vol. 415, cols. 971-2: 15 December 1980.)

### **Part Nine: IX. Seas, waterways—exclusive fishery zone**

(See also Part Nine: VIII., *supra*, and Part Nine: X., *infra*.)

In reply to a question, the Secretary of State for Scotland wrote:

My Department took part in further negotiations between the EEC and the Faroe Islands on 9-10 January aimed at establishing a reciprocal fisheries agreement for 1980. It was not possible to reach agreement and a further meeting will be held on 12-13 February. Meanwhile, however, it was decided that vessels of each party could fish in the other party's zone on an interim basis with effect from midnight, 10 January. (H.C. Debs., vol. 976, Written Answers, col. 551: 14 January 1980.)

In reply to a question, the Parliamentary Under-Secretary of State, Department of Trade, wrote:

Soviet trawlers have no fishing rights within the United Kingdom's 200-mile fisheries zone but Soviet fishing support ships enter our territorial waters to buy and sell fish. (H.C. Debs., vol. 977, Written Answers, col. 199: 22 January 1980. See also *ibid.*, col. 785: 1 February 1980.)

In reply to a question on the current state of negotiations on fishing rights, the Minister of State, Department of Agriculture, Fisheries and Food, wrote:

The EEC has reached agreement with Canada, Senegal and Guinea-Bissau on



fishing arrangements for 1980. The EEC Commission has also negotiated provisional agreements for 1980 with Norway, Spain and Sweden. Negotiations are continuing with the Faroe Islands and certain African countries. Community quotas have been established for 1980 in United States of America waters and international waters in the North-West Atlantic. (H.C. Debs., vol. 978, Written Answers, col. 787: 14 February 1980.)

In reply to a question asking for details of vessels arrested in United Kingdom waters for illegal fishing since 1 July 1979, the Minister of State, Department of Agriculture, Fisheries and Food, set out the following table:

DANISH VESSELS				
<i>Result</i>	<i>Penalty</i>	<i>Charge</i>	<i>Species</i>	<i>Catch value</i> £
1. Guilty	£250 fine; £50 costs	Illegal attachment	Cod, plaice, lemon sole, dog fish	Not known
2. Guilty	£1,000 fine; £178 costs	Failure to comply with the requirements of a British Sea Fishery Officer.	Sprat and herring	Not known
FRENCH VESSELS				
<i>Result</i>	<i>Penalty</i>	<i>Charge</i>	<i>Species</i>	<i>Catch value</i> £
3. Guilty	£250 fine; £100 costs	Illegal net	Nephrops and mixed white fish	Not known
4. Guilty	£250 fine; £100 costs; One net forfeit.	Illegal net	Nephrops, whiting, cod	Not known
5. Guilty	£250 fine; £100 costs; Nets forfeit.	Illegal nets	Nephrops, dog fish, angler, cod, whiting, hake.	2,600
6. Guilty	£250 fine; £100 costs; Nets value £150 forfeit.	Illegal nets	Hake, nephrops, monk, dog fish, sole, John dory.	Not known
7. Guilty (Appeal pending)	£250 fine; £100 costs; Nets (value £150) forfeit.	Illegal nets	Nephrops, dog fish, monk, skate, hake.	Not known
8. Case pending	—	Illegal nets	Nephrops, monk, dog fish, whiting, ling, pollock.	Not known
SPANISH VESSELS				
<i>Result</i>	<i>Penalty</i>	<i>Charge</i>	<i>Species</i>	<i>Catch value</i> £
9. Guilty	£500 fine; £220 costs; Cod end of net (value £200) forfeit.	Illegal net	Hake, megrim, ling, monk	5,500
10. Guilty	£7,500 fine; Catch and gear forfeit.	Fishing for unauthorised species.	Haddock and whiting	2,500
11. Guilty	£6,000 fine; Catch forfeit.	Fishing within 12 mile line; fishing for unauthorised species; failure to comply with the requirements of a British Sea Fishery Officer.	Cod, whiting, haddock, saithe, halibut.	4,000

[Details of prosecutions of United Kingdom vessels have been omitted.]

(H.C. Debs., vol. 979, Written Answers, cols. 777-80: 29 February 1980.)

In the course of replying to a question on the subject of the Falkland Islands, the Minister of State, Foreign and Commonwealth Office, Mr. Nicholas Ridley, stated:

It would be impossible to police a 200-mile zone fishing limit round the Falkland Islands without the agreement of the Argentine Government. (H.C. Debs., vol. 982, col. 1195: 16 April 1980.)

In his opening statement at the Conference on the Conservation of

Antarctic Marine Living Resources, held in Canberra, the leader of the United Kingdom delegation, Sir Donald Logan, stated:

... my Government has noted that international law on fishing, as reflected in widespread State practice, gives coastal states sovereign rights over the exploitation of the living resources of a zone up to 200 miles in breadth. In general, if the coastal state could not itself exploit these resources, it should allow other states access to the surplus under conditions which it imposes and through agreements which it concludes. (CAMLRL/8, p. 2: 7 May 1980.)

In reply to questions on the subject of fisheries, the Minister of Agriculture, Fisheries and Food, wrote:

Within the United Kingdom fishery limits, fishing for herring is prohibited in the North Sea, to the west of Scotland, in the south western approaches and in the English Channel. Fishing for Norway pout is also prohibited in a specified area off the north east of Scotland. Fishing for mackerel in a specified area off the south west of England with purse seines or trawls of less than 70mm is also prohibited until 15 November. All these prohibitions—and a number of other measures regulating, for example, the gear to be used in certain areas—apply to vessels of all nationalities.

In addition fishing for western mackerel by certain United Kingdom vessels and United Kingdom fishing for herring in the north Irish Sea is at present suspended under arrangements to phase United Kingdom fishing over the year. There are also, of course, various measures which restrict foreign, but not United Kingdom fishing in these areas and elsewhere in our waters.

... Since 1977 Russian vessels have been prohibited under section 2(2) of the Fishery Limits Act 1976 from fishing within United Kingdom fishery limits.

... The bulk of future catching opportunities are likely to be found in waters under the sovereignty or jurisdiction of European Community member States, in which the Government seek a substantial share of the available quotas for the United Kingdom. Some limited opportunities are available in the waters of third countries as a result of the negotiation of agreements between the Community and the countries concerned. (H.C. Debs., vol. 984, Written Answers, cols. 163–5: 7 May 1980.)

In reply to a question which asked, *inter alia*, what effect the Convention for the Conservation of Antarctic Marine Living Resources, recently concluded in Canberra, had on British rights to control fishing around South Georgia and South Sandwich, the Minister of State, Foreign and Commonwealth Office, wrote in part:

The convention establishes conservation principles and does not affect our right to control fishing within existing or future national fishery limits. The convention specifically provides that nothing in it and no acts taking place while it is in force shall be interpreted as a renunciation or diminution by any contracting party of its right to exercise coastal State jurisdiction under international law. (H.C. Debs., vol. 985, Written Answers, cols. 866–7: 5 June 1980.)

In reply to a question inquiring about the arrest by Spanish authorities of the United Kingdom registered whaling vessel *Rainbow Warrior*,

the Secretary of State for Foreign and Commonwealth Affairs, Lord Carrington, stated:

... the 'Rainbow Warrior' was within 200 miles of the Spanish coast and Her Majesty's Government recognise the rights of states to control the exploitation of living resources of the sea within the 200-mile limits. The Spanish Government are parties to the International Whaling Commission and have been given a quota. I understand that they are appealing against the quota and the appeal will be heard next month. In the meantime there is no reason to suppose that they have exceeded their quota and indeed they have said they have not. (H.L. Debs., vol. 411, col. 1169: 9 July 1980.)

**Part Nine: X. Seas, waterways—exclusive economic zone**

In the course of observations on the Second Report from the Expenditure Committee of the House of Commons on measures to prevent collisions and strandings of noxious cargo carriers in waters around the United Kingdom, it was written on behalf of the Government:

Since they maintain that the proposed EEZ would be an area of the high seas, the Government do not consider that any difficulty will arise with the Intervention Convention if a new Law of the Sea Convention providing for an EEZ enters into force. (Cmnd. 7525, p. 1.)

On 22 January 1980 the British High Commission and the French Embassy in Suva, Fiji, presented a joint diplomatic note to the Government of Fiji. The note read in part as follows:

The Government of the French Republic and the Government of the United Kingdom have taken note of the intention of the Government of Fiji to establish a maritime zone of 200 miles from the baselines from which the breadth of the territorial waters of Fiji is measured.

In view of the forthcoming independence of the New Hebrides and the permanent character which an eventual delimitation of Fiji and New Hebridean 200-mile zones would have, the two Governments consider that any definitive delimitation should be effected after the Condominium regime has ceased to exist by direct agreement between the New Hebridean and Fiji authorities.

However, even in the absence of a definitive delimitation, the establishment by the Government of Fiji of a 200-mile zone does not give rise to any objection on the part of the two Governments, provided that the rights and powers exercised by the Government of Fiji in the zone conform with established international law.

It is understood that the median or equidistant line, defined in the Department's Note of 27 December 1978, will serve provisionally to delimit the competences exercised respectively in the New Hebrides zone and in the Fiji zone in respect of the sovereign rights recognised by international law for the purposes of exploration and exploitation of natural resources.

In the view of the two Governments, this provisional delimitation is expressly subject to a definitive delimitation which should be undertaken as set out above, by negotiation between the representatives of the two Governments of the New Hebrides and Fiji. (Text provided by the Foreign and Commonwealth Office.)



**Part Nine: XI. *Seas, waterways—rivers***

In reply to a question, the Government Minister in the House of Lords wrote:

The main international agreements governing navigation on the Rhine are the Revised Convention for Rhine Navigation signed at Mannheim on 17th October, 1968 (the Act of Mannheim), and its Additional Protocol of 25th October, 1972.

The parties to the Act of Mannheim (Belgium, France, Federal Republic of Germany, Netherlands, Switzerland and United Kingdom) have recently concluded a further Additional Protocol, accompanied by a Protocol of Signature, which was signed in Strasbourg on 17th October, 1979.

Under the terms of the new Protocol, which will enter into force on ratification by all the signatories, navigation as such will continue to be free for all merchant vessels. In addition, vessels belonging to the Rhine navigation (i.e. vessels having the right to fly the flag of a state party to the Protocol and equipped with a document to substantiate this right) will be allowed to trade freely between the Rhine and elsewhere; or to engage in cabotage on the Rhine.

By virtue of the Protocol of Signature to the Additional Protocol, the vessels of all EEC states will be treated in the same way as vessels belonging to the Rhine navigation.

For other vessels, including those from the Soviet Union and Eastern Europe, the conditions under which they may trade between the Rhine and a third state will be laid down in agreements to be concluded between the states concerned after consultation with the Central Rhine Commission. Cabotage by such vessels will be determined by any conditions which may be specified by the Central Rhine Commission. Details of such conditions have yet to be settled.

The Act of Mannheim and the Additional Protocols are concerned only with merchant vessels and do not create any right of access to the Rhine for naval ships. (H.L. Debs., vol. 412, cols. 377–8: 22 July 1980.)

**Part Nine: XII. *Seas, waterways—bed of the sea beyond national jurisdiction***

In reply to a question, the Parliamentary Under-Secretary of State, Department of Industry, wrote:

In the context of the United Nations Law of the Sea Conference, the Government's aim is to negotiate an international seabed mining regime which, while sharing the benefits and the opportunity to participate among all states, will offer adequate incentives to companies to undertake deep sea mining projects. Three British companies are currently operating in a consortium with partners from the United States, Canada and Japan. The Government keep in close touch with these Governments and the companies themselves. (H.C. Debs., vol. 976, Written Answers, col. 631: 14 January 1980.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The internal arrangements for commercial deep sea bed mining consortia are a matter for the companies concerned. But Her Majesty's Government will

continue to work closely with the United States Government in seeking to obtain assured access for companies to deep sea bed minerals under an international regime. (H.C. Debs., vol. 979, Written Answers, col. 153: 19 February 1980.)

During the 130th plenary meeting of the Third United Nations Conference on the Law of the Sea, held on 28 July 1980, the leader of the United Kingdom delegation, Mr. J. E. Powell-Jones, made a statement which read in part:

I feel obliged to place on record that the United Kingdom Government's views on deep sea bed mining which have been stated on earlier occasions have not changed. We do not consider legislation on deep sea mining to be contrary to international law. (Text provided by the Foreign and Commonwealth Office.)

In reply to a question, the Lord Chancellor, Lord Hailsham, stated:

The United States have enacted legislation to establish an interim procedure for the orderly development of seabed resources, pending the entry into force of an acceptable Law of the Sea Convention. Similar legislation is in the course of being enacted in the Federal Republic of Germany. The so-called Group of Seventy-seven have repeated at this session their opposition to national legislation. Her Majesty's Government do not accept that interim legislation is contrary to international law or that it should stand in the way of efforts to negotiate an international deep seabed mining regime which gives effect to the concept of the common heritage of mankind. (H.L. Debs., vol. 412, col. 1483: 6 August 1980.)

On 4 December 1980, the Government introduced into the House of Lords the Deep Sea Mining (Temporary Provisions) Bill, which received its first reading. The Bill seeks to regulate the exploration for, and recovery of, the hard mineral resources (certain metal-bearing nodules) of the deep sea bed. It is intended to be a temporary measure, making interim provision pending international agreement in respect of those matters, such as an agreement being currently under negotiation at the Third United Nations Conference on the Law of the Sea (H.L. Debs., vol. 415, col. 524: 4 December 1980; further material on the subject of this Bill will appear in UKMIL 1981).

**Part Ten: I. A. *Air space, outer space—sovereignty over air space—extent***

In reply to a question, the Government Minister in the House of Lords wrote:

Soviet military aircraft regularly fly into, and are intercepted within, the United Kingdom Air Defence Region, a nationally defined area which has no status in international law. There were on average five such interceptions per week in 1979. The aircraft concerned do not, however, penetrate our territorial air space, and there are therefore no grounds for a protest to be made to the Soviet Union. (H.L. Debs., vol. 414, col. 1040: 4 November 1980.)

**Part Ten: I. B. *Air space, outer space—sovereignty over air space—limitations***

In reply to a question, the Parliamentary Under-Secretary of State, Department of Trade, wrote:

At the meeting of the Permanent Commission of Eurocontrol, the European organisation for the safety of air navigation on 20 November I took the chair, and my hon. Friend the Under-Secretary of State for Defence for the Royal Air Force led the United Kingdom delegation.

The Permanent Commission approved the five year plan for Eurocontrol, the investment and operating budgets, long term costings, and a new agreement on route charges (in which non-member States may participate). It also took an important decision about the future role and activities of the organisation, by approving a draft protocol amending the Eurocontrol International Convention of 1960. This amending protocol is to be signed at a diplomatic conference early next year and, subject to ratification by the member States, will come into force on 1 March 1983.

The arrangements embodied in the protocol are the result of several years' intensive study to define the role of Eurocontrol after 1983 when the initial 20 year term of the 1960 convention is due to end. The Permanent Commission concluded that the basic concept of the original convention, the horizontal division of member States' airspace, was no longer justifiable in operational, technical, or financial terms. The Permanent Commission also took into account the desirability of extending the present membership to include other European States, of simplifying the extremely complex communal finance system, of balancing the competing demands of all airspace users, civil and military, the economic importance of air traffic services, and the need for a flexible response to new demands and technical developments.

Accordingly, the amended convention will extend Eurocontrol's responsibilities for the co-ordination of air traffic control planning to cover the whole airspace, with co-ordinated research and development, and common training policies. Eurocontrol will in future play a key role in developing and operating a European system of flow management. The complex communal financing of operational facilities will be progressively wound up. Air traffic control in the upper airspace will become the formal responsibility of member States, though they will be able, singly or jointly, to entrust the task to Eurocontrol. In practice this change is one of form only since most upper airspace facilities have always been operated by national Administrations.

I am satisfied that under the amended convention the combined efforts of member States, exerted through Eurocontrol, will provide the best guarantee that safety and efficiency will remain the prime objectives of the European air traffic control system. (H.C. Debs., vol. 996, Written Answers, cols. 20-1: 15 December 1980.)

**Part Ten: II. A. 1. *Air space, outer space—air navigation—civil aviation—legal status of aircraft***

In the course of the debate on the third reading in the House of Commons of the Iran (Temporary Powers) Bill, the Minister of State, Foreign and Commonwealth Office, Mr. Hurd, stated:



There is no international law objection to a State assuming criminal jurisdiction over . . . aircraft registered in its territory. (H.C. Debs., vol. 984, col. 1275: 13 May 1980.)

**Part Ten: II. A. 2.** *Air space, outer space—air navigation—civil aviation—treaty regime*

Following the crash at Chicago in May 1979 of a DC-10 aircraft, the Administrator of the United States Federal Aviation Authority issued a Special Federal Aviation Regulation (SFAR 40) which prohibited the operation of any DC-10 aircraft within United States airspace, including DC-10s registered outside the United States. At this time other States, including the United Kingdom, withdrew certificates of airworthiness for DC-10s on their registries, but later restored them. SFAR 40, however, remained in operation and was not modified to exclude DC-10s in possession of foreign certificates of airworthiness. The United Kingdom Government made representations to the United States authorities, calling their attention to their obligations under Articles 6 and 2 of the Agreement concerning Air Services (Bermuda 2 Agreement) and under Article 33 of the Chicago Convention on International Civil Aviation. Later, the United Kingdom Government participated in a common approach by the member States of the European Civil Aviation Conference (ECAC), asserting that, on the basis of Article 33 of the Chicago Convention and relevant articles in bilateral air services agreements, the European airlines operating DC-10s were legally entitled to recognition of the European certificates of airworthiness and were therefore entitled under international law to resume flying the aircraft into and out of the United States.

Once normal operations were resumed, the United Kingdom Government took no further diplomatic steps with regard to its direct interest in the fulfilment of treaty obligations owed to it by the United States. It filed, however, an *amicus curiae* Brief, dated 8 April 1980, in proceedings whereby the British airline British Caledonian Airways Ltd. sought to recover in the United States courts the operating losses it suffered from the action of the Administrator of the Federal Aviation Administration. After discussing the conventional provisions mentioned above, the Brief concluded:

The Government of the United Kingdom therefore support the claim made in these proceedings by its airline British Caledonian that in promulgating SFAR 40—and more particularly by maintaining it without amendment so as to ban UK-certificated aircraft of UK airlines—the Federal Aviation Administrator failed to act consistently with obligations assumed by the United States in Article 6 of the Bermuda 2 Agreement and in Article 33 of the Chicago Convention. The primary object of the United Kingdom Government in submitting these views as *amicus* to this court is to put before this court and to establish the position which it has taken during diplomatic negotiations that these international agreements

obliged the United States to recognize the United Kingdom certificates of airworthiness for the purpose of British Caledonian's operations pursuant to the Bermuda 2 Agreement. The position of the United Kingdom Government is that the losses incurred by British Caledonian between June 19 and July 13 as a result of SFAR 40 were the direct result of action by the Federal Aviation Administrator which could not be justified under international agreements between the United Kingdom and the United States. British Caledonian should be entitled to recover these revenue losses by way of compensation. (*Amicus curiae* Brief of the Government of the United Kingdom, p. 12: United States Court of Appeals for the District of Columbia Circuit: *British Caledonian Airways Ltd. v. Langhorne M. Bond* (Administrator, Federal Aviation Administration), 8 April 1980.)

In reply to a question, the Parliamentary Under-Secretary of State, Department of Trade, wrote:

Under the provisions of article 37 of the Convention on International Civil Aviation (Chicago Convention), it is the responsibility of the State of registry of an aircraft to ensure that the minimum standards of safety and competence laid down in Annex 6 to that Convention are fully complied with. (H.C. Debs., vol. 985, Written Answers, col. 498: 2 June 1980.)

### **Part Ten: III. Air space, outer space—outer space**

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The United Kingdom supported the agreement governing the activities of States on the moon and other celestial bodies adopted by the United Nations General Assembly on 5 December 1979.

The agreement was opened for signature early this year. Neither the United States nor the USSR, without whom the agreement would have little value, has signed. Their attitude will be a major factor in influencing the decision of the United Kingdom on signature. (H.C. Debs., vol. 992, Written Answers, col. 303: 13 November 1980.)

### **Part Eleven: II. A. 1. Responsibility—responsible entities—States—elements of responsibility**

(See also Part Three: III. F., *supra*, and Part Thirteen: I. D., *infra*.)

In the course of a statement issued on 22 June 1980 in Venice by the Seven Nations Summit Meeting (including the United Kingdom), it was observed.

The Heads of State and Government recall that every State has the duty under international law to refrain from organising, instigating, assisting or participating in terrorist acts in another State or acquiescing in organised activities within its territory directed towards the commission of such acts, and deplore in the strongest terms any breach of this duty. (Text provided by the Foreign and Commonwealth Office.)

In the course of his speech on 17 November 1980 in the Sixth

Committee of the General Assembly of the United Nations on the subject of the Report of the International Law Commission on State responsibility, the United Kingdom delegate, Sir Ian Sinclair, stated:

... it seems difficult to accept the thesis that, in the context of the codification of the law of State responsibility, a liability to compensate for damage can arise for a State having committed an act in circumstances where the wrongfulness of that act is precluded. (Text provided by the Foreign and Commonwealth Office.)

The United Kingdom delegate then turned to the Report of the International Law Commission on international liability for injurious consequences of acts not prohibited by international law. He stated:

Many of the more immediate transnational problems which arise in this context are already regulated by specific international conventions, a number of which incorporate regimes of strict liability or liability covered by insurance or guarantee funds. No doubt this process of specific regulation of particular injurious consequences will be further expanded and developed to deal with new problems as they arise. This is a process which we welcome and in which we participate actively. (Ibid.)

**Part Eleven: II. A. 6. Responsibility—responsible entities—States—reparation**

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

The question of assets left by United Kingdom citizens in Uganda has been raised with the Ugandan authorities on several occasions. The Ugandan Government have undertaken to set up a Compensation Commission to deal with claims, and the Minister of Finance has given assurances that the necessary legislation will be tabled by the end of February. (H.C. Debs., vol. 977, Written Answers, col. 768: 31 January 1980.)

On 13 February 1980 the Government of the United Kingdom and the Government of Sri Lanka signed an Agreement for the Promotion and Protection of Investments. Article 5 of the Agreement reads as follows:

EXPROPRIATION

(1) Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party except for a public purpose related to the needs of that Party and against prompt, adequate and effective compensation. Such compensation shall amount to the value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge and shall include interest at a normal commercial rate until the date of payment. Payment of compensation shall be made without delay and the Contracting Party making the expropriation shall guarantee free transfer of the compensation at the official rate of exchange prevailing on the date used for the determination of value. The national or company affected shall have a right,



under the law of the Contracting Party making the expropriation, to prompt determination of the amount of compensation either by law or by agreement between the parties and to prompt review, by a judicial or other independent authority of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares. (Cmnd. 7984, p. 4.)

In the course of a statement on 17 November 1980 on the subject of the Report of the International Law Commission, the leader of the United Kingdom delegation to the Sixth Committee of the United Nations, Sir Ian Sinclair, remarked:

. . . the normal remedy in cases of breach of an international obligation is reparation (whether in monetary terms or by way of *restitutio in integrum*) and . . . the application of counter-measures or other forms of sanction is admitted only exceptionally—that is to say, in circumstances where the essential interests of the injured State cannot be protected by reparation alone. (Text provided by the Foreign and Commonwealth Office; the extract is summarized in A/C.6/35/SR. 51, p. 5.)

### **Part Eleven: II. A. 7. Responsibility—States—procedure**

In the course of an answer to an oral question, the Lord Privy Seal, Sir Ian Gilmour, stated:

The Turkish Cypriots have now approved 140 ex-gratia awards to British subjects as recommended by their claims commission and payment of these awards has begun. (H.C. Debs., vol. 978, col. 1510: 13 February 1980.)

### **Part Eleven: II. A. 7. (a). (i). Responsibility—responsible entities—States—procedure—diplomatic protection—nationality of claims**

On 13 February 1980, the Government of the United Kingdom and the Government of Sri Lanka signed an Agreement for the Promotion and Protection of Investments. Article 8 (2) of the Agreement reads as follows:

A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25 (2) (b) of the Convention [on the Settlement of Investment Disputes] be treated for the purposes of the Convention as a company of the other Contracting Party. (Cmnd. 7984, p. 5.)

In reply to a question about British-owned property in Famagusta,

Cyprus, now expropriated by the Turkish Cypriot Government, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, stated in part:

Her Majesty's Government will continue to make clear to the Turkish Cypriot authorities their concern about the present position of United Kingdom nationals who own properties in Famagusta. (H.C. Debs., vol. 984, Written Answers, col. 250: 24 April 1980.)

In reply to a question on the subject of Miss Claire Wilson, a dual United Kingdom/Chilean national imprisoned and allegedly ill treated in Chile, the Minister of State, Foreign and Commonwealth Office, wrote:

Despite the limitation on our ability to intervene on behalf of a dual national in the country of her other nationality, we successfully procured her release from prison and have protested to the Chilean Government about the treatment Miss Wilson received during her detention. (H.C. Debs., vol. 995, Written Answers, col. 267: 4 December 1980.)

**Part Twelve: II. F.** *Pacific settlement of disputes—modes of settlement—conciliation*

(See also Part Twelve: II. H. 1. (Sir Ian Sinclair's speech of 11 November 1980), *infra*.)

On 13 February 1980 the Government of the United Kingdom and the Government of Sri Lanka signed an Agreement for the Promotion and Protection of Investments. Article 8 (1) of the Agreement reads as follows:

Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as 'the Centre') for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any legal disputes arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former. (Cmnd. 7984, p. 5.)

**Part Twelve: II. G. 1.** *Pacific settlement of disputes—modes of settlement—arbitration—arbitral tribunals and commissions*

(See Part Twelve: II. H. 1. (Sir Ian Sinclair's speech of 11 November 1980), *infra*, and Part Twelve: II. F., *supra*.)

**Part Twelve: II. H. 1.** *Pacific settlement of disputes—modes of settlement—judicial settlement—the International Court of Justice*

(See also Part Five: IV. (reply of 30 January 1980), *supra*.)

In reply to the question whether in the light of recent evidence that the Court's judgment in the *Corfu Channel* case in 1949 was based on errors of fact the United Kingdom would waive its claim against Albania under

that judgment, the Minister of State, Foreign and Commonwealth Office, wrote:

We know of no convincing evidence that the International Court of Justice verdict in the Corfu Channel case was based on errors of fact. (H.C. Debs., vol. 990, Written Answers, col. 270: 7 August 1980.)

In the course of his speech on 11 November 1980 in the Sixth Committee of the General Assembly of the United Nations on the subject of the Report of the International Law Commission on treaties concluded between States and international organizations or between two or more international organizations, the United Kingdom delegate, Sir Ian Sinclair, stated:

In considering what provision to make with respect to the settlement of disputes arising out of Part V of the present draft, the Commission was obliged to take account of the fact that at present, only States may be parties in cases before the International Court of Justice. This is the clear effect of Article 34 of the Statute of the Court. Accordingly, the possibility of recourse to the Court in contentious proceedings on any dispute concerning the interpretation or application of the *jus cogens* articles in the draft has to be excluded if an international organization is party to that dispute. We have considerable doubts about the solution which the Commission recommend—namely, that disputes as to the interpretation or application of the *jus cogens* articles arising as between two international organizations or as between a State and an international organization should be subject to the compulsory conciliation machinery provided for in the Annex. *Prima facie*, this is not entirely satisfactory, given the importance which my Government and many other governments attached at the Vienna Conference on the Law of Treaties to the concept that at least those disputes arising out of the interpretation or application of the *jus cogens* articles in the Vienna Convention should be the subject of a binding judicial determination. We think that further thought ought to be given to the possibility of requiring that disputes of this nature should be made the subject of arbitration if the parties to the treaty in question have not accepted the option of referring them to the International Court for an advisory opinion which they would accept in advance as binding. (Text provided by the Foreign and Commonwealth Office.)

In the course of its deliberations on the role of the United Kingdom Parliament in relation to the British North America Acts, the Foreign Affairs Committee of the House of Commons addressed a number of questions to the Foreign and Commonwealth Office. One question ran:

Could the Canadian Government institute proceedings in the International Court of Justice or otherwise under international law against the United Kingdom in the event of a refusal by the United Kingdom to enact the Canada Bill 1980?

The reply of the Foreign and Commonwealth Office was given in a memorandum dated 11 November 1980 as follows:

Both the United Kingdom and Canada accept as compulsory on condition of



reciprocity the jurisdiction of the International Court of Justice, in conformity with Art. 36 (2) of its Statute, although in each case certain categories of disputes are excluded. Among those excluded by Canada are disputes with the Government of any other country which is a member of the Commonwealth; and among those excluded by the United Kingdom are disputes with the Government of any other country which is a member of the Commonwealth with regard to situations or facts existing before 1 January 1969 [relevant declarations attached].

There appears to be no other basis on which Canada could institute proceedings under international law against the United Kingdom unilaterally. (*Parliamentary Papers*, 1979-80, House of Commons, Paper 362-xxi, p. 62.)

In reply to the question whether the Canadian Government could seek an advisory opinion from the International Court of Justice in respect of the above situation, Mr. J. R. Freeland, Second Legal Adviser, Foreign and Commonwealth Office, stated to the Committee on 12 November 1980:

... Canada would not have any such recourse to the International Court of Justice because advisory opinions of that court are not available at the request of individual States. Advisory opinions can be obtained by the Security Council or General Assembly of the United Nations or by certain other bodies authorized by the General Assembly, and this includes certain other intergovernmental organisations; but there is no basis on which a State as such can obtain an advisory opinion from the court. (*Ibid.*, p. 70.)

### **Part Thirteen: I. Coercion and use of force short of war—unilateral acts**

In a statement on 29 October 1980 in the Sixth Committee of the General Assembly of the United Nations on the subject of a proposal for a treaty on the non-use of force, the United Kingdom delegate, Mr. D. H. Anderson, stated:

The position of the United Kingdom towards the initiative is well known and remains unchanged. We support the existing law as contained in the Charter. There is no need for some new so-called world treaty on the non-use of force. The Charter itself represents amongst other things such a treaty. It enjoys the status of superior law by virtue of its Article 103. It reflects customary law binding on all other States. We are opposed to the idea of concluding some new treaty outside the Charter—separate from the Charter—regarding the non-use of force, because it would inevitably weaken the Charter. It would be outside the system created by the Charter which we are all committed to support. The parties to some new treaty would inevitably be different from the membership of the UN. There is no parallel with the case of human rights such as the Distinguished Representative of the Soviet Union tried to argue. Articles 55 and 56 of the Charter provided signposts in 1945 for the positive developments which have taken place subsequently. I refer to the subsequent creation of the Human Rights Commission, to the adoption of the Universal Declaration of Human Rights and to the conclusion of the two Covenants. As regards the principle of the non-use of force, the position was different. There already existed a basis in international law in 1945 for the principles enshrined in Articles 2 and 51. The institutional arrangements for the

peaceful settlement of disputes and for dealing with threats to the peace were, in 1945 and still are of course, integral parts of the Charter. The fundamental rule in Article 2 (4) of the Charter is a prohibition. Prohibitions are not strengthened by trying to embroider the words. Prohibitions are different from provisions such as those in Articles 55 and 56. Indeed, there is a grave danger in trying to embroider prohibitions of actually restricting their scope. The danger exists of creating exceptions.

This leads me to the draft treaty put forward by the sponsors. Looking at its terms, bearing in mind Soviet views on international law and not forgetting recent events, there arises a serious question whether this draft treaty would not actually try to create exceptions contrary to the law of the Charter. The Charter does not recognize any doctrine of limited sovereignty. The Charter cannot be replaced by any new or higher type of law. This is true whether such a so-called higher type of international law is called 'socialist' or any other name reflecting a particular ideology. We are all bound by the Charter and its Article 103 prevents the existence of any higher types of international law. A new treaty, supposedly designed to enhance the effectiveness of the law on the Non-use of Force but which actually allowed for the use of force in circumstances which are not allowed for today, would quite clearly be a retrograde step. For these reasons, my delegation remains opposed to this initiative. Instead, we should all fulfil our obligations under the Charter and strive to make the system it created work more effectively. (Text provided by the Foreign and Commonwealth Office; the speech is summarized in A/C.6/35/SR. 32, pp. 4-5.)

In a statement to the Sixth Committee of the General Assembly of the United Nations on 6 November 1980, the United Kingdom delegate declared:

My delegation supports the present law on the non-use of force. We oppose the draft world treaty because it would tend to weaken the present law of the Charter. Moreover, the draft world treaty attempts to create an exception in the present law to allow for the Soviet doctrine of limited sovereignty. The dangers of this doctrine, which is unacceptable, have once again become apparent in recent months. (Text provided by the Foreign and Commonwealth Office.)

**Part Thirteen: I. D. Coercion and use of force short of war—unilateral acts—intervention**

(See also Part Fourteen: I. B. 8., *infra*.)

In the course of a debate in the Security Council of the United Nations on 5 January 1980, the leader of the United Kingdom delegation, Sir Anthony Parsons, stated:

The Soviet invasion of Afghanistan is a direct and flagrant violation not only of the mass of resolutions brought by the Soviet Union to the General Assembly, but also of the more sober and compelling language of the United Nations Charter, to which all of us subscribe. As I said earlier, representatives of the Soviet Union lose no opportunity in this and other places to remind us of their devotion to the principles of non-intervention, respect for sovereignty, non-use of force and

non-aggression. I would ask them to reread, and reread closely, Chapter I of the Charter that binds us all. (S/PV. 2186, p. 32.)

On 12 January 1980 Sir Anthony Parsons made a further speech in the Security Council on the subject of Afghanistan. In the course of it he said:

... the trouble in Afghanistan was a spontaneous expression of the discontent of the Afghan people with their régime; and that the Soviet military intervention was a flagrant violation of the sovereignty and territorial integrity of Afghanistan without any valid pretext of self-defence. (Text provided by the Foreign and Commonwealth Office.)

In the course of a debate in the House of Commons on the subject of Afghanistan, the Minister of State, Foreign and Commonwealth Office, Mr. Douglas Hurd, stated:

In the view of Her Majesty's Government, the Soviet invasion of Afghanistan on 27 December was an unprovoked act of aggression against an independent country. It represents a serious threat to world peace and an unprecedented development in the history of post-war Soviet expansion. The Soviet Union acted, to establish a military hold on a sovereign country, in violation of the international principles which the Soviet Union constantly calls on others to observe. The Soviet Union justified its act by alleging prior foreign intervention. Yet the only intervention has been the Soviet invasion. (H.C. Debs., vol. 976, col. 1222: 14 January 1980.)

In the course of a statement in the House of Commons on the subject of Afghanistan, the Lord Privy Seal, Sir Ian Gilmour, stated:

The Soviet invasion of Afghanistan is an event of the widest significance. For the first time since the Second World War, Soviet combat troops have been used in massive numbers outside Europe to establish a military hold on a sovereign, non-aligned country.

The Soviet action is a breach of all the conventions that have governed East-West relations for the past decade. (H.C. Debs., vol. 977, col. 655: 24 January 1980.)

In the course of a written answer about Her Majesty's Government's attitude to certain events in the Olympic Games projected to take place in Estonia, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, remarked:

Our advice to British athletes not to participate in Olympic events in Moscow applies with added force to Olympic events in Estonia, whose occupation by the Soviet Union was illegal. (H.C. Debs., vol. 980, Written Answers, col. 223: 5 March 1980.)

In the course of a statement about the meeting of the European Council held on 27 and 28 April 1980, the Secretary of State for Foreign and Commonwealth Affairs, Lord Carrington, remarked:

We reaffirmed the absolute necessity for every government in the world, whatever



its political attitude, to respect the Charter of the United Nations and the principles of international law. This requires in Afghanistan that Soviet forces should withdraw . . . (H.L. Debs., vol. 408, col. 1149: 29 April 1980.)

In the course of a statement on the subject of the taking of diplomatic hostages issued on 22 June 1980 in Venice by the Seven Nation Summit Meeting (including the United Kingdom) it was remarked:

The Heads of State and Government recall that every State has the duty under international law to refrain from organising, instigating, assisting or participating in terrorist acts in another State or acquiescing in organised activities within its territory directed towards the commission of such acts, and deplore in the strongest terms any breach of this duty. (Text provided by the Foreign and Commonwealth Office.)

In reply to a question on the subject of the implementation by the Soviet Union and Eastern European countries of the Helsinki Final Act, the Minister of State, Foreign and Commonwealth Office, gave a report from which the following passages are extracted:

#### FURTHER REPORT ON SOVIET AND EASTERN EUROPEAN IMPLEMENTATION OF THE HELSINKI FINAL ACT FOR THE PERIOD DECEMBER 1979 TO JUNE 1980

##### *General*

1. The period since the last report has been overshadowed by the Soviet invasion of Afghanistan and by the continued occupation of that traditionally neutral and non-aligned country by substantial Soviet military forces. Soviet troops have been directly engaged in attempting to crush Afghan popular resistance to their occupation and have inflicted appalling suffering on the Afghan people. This action violates all the norms of international behaviour including the provisions of the United Nations Charter and the Principles of the Helsinki Final Act. It has been condemned by an unprecedented majority of members of the United Nations and by the Islamic world. It represents a most serious setback to the pursuit of genuine detente and international co-operation which can only develop on a global basis and on a foundation of trust and mutual confidence. In CSCE [Conference on Security and Co-operation in Europe] terms the most regrettable consequence of the invasion has been to demonstrate the vulnerability of the CSCE process if certain signatories choose to take advantage of detente in Europe to pursue narrow national advantage elsewhere.

##### *Principles*

3. The Soviet invasion of Afghanistan, carried out under the guise of an 'invitation' from a Government whose leader was murdered shortly after the arrival of his 'guests' violates a clear commitment by the signatories of the Final Act to conduct their relations with all other States in the spirit of the 10 principles. These include the principles of sovereign equality, territorial integrity of States, inviolability of frontiers, equal rights and self-determination of peoples, refraining from the threat or use of force and non-intervention in internal affairs. The last of these specifically states that signatories will refrain from any intervention in the internal or external affairs of another participating state 'regardless of their mutual relations'. Soviet action cannot possibly be claimed to be consistent with respect

for these principles. The Soviet authorities have, moreover, sought to distort the meaning of the principles by claiming their own action to have been justified by alleged but unsubstantiated intervention in the internal affairs of Afghanistan by other countries. (H.C. Debs., vol. 987, Written Answers, cols. 621-2: 2 July 1980.)

In the course of a statement in the House of Lords on the subject of East Timor, the Government Minister, Lord Trefgarne, remarked:

Successive British Governments have not felt able to recognise the incorporation of East Timor into Indonesia. It is unacceptable to us that a territory can be taken over by force, whatever the previous situation there may have been. We cannot believe that an act of self-determination could properly have taken place in the conditions prevailing immediately after the Indonesian intervention, when substantial fighting was still going on and a large proportion of the territory's population had become refugees. The United Kingdom therefore voted for the United Nations Security Council's resolutions of 1975 and 1976, which condemned the Indonesian intervention and reaffirmed the right of the East Timorese to self-determination. (H.L. Debs., vol. 415, col. 574: 4 December 1980.)

**Part Thirteen: II. A. *Coercion and use of force short of war—collective measures—regime of the United Nations***

In response to a request to list the Orders in Council made under section 1 of the United Nations Act 1946, the Minister of State, Foreign and Commonwealth Office, wrote:

List of Orders in Council made under Section 1 of the United Nations Act 1946:

Southern Rhodesia (Prohibited Trade and Dealings) (Overseas Territories) Order 1967 (1967/18)

Southern Rhodesia (Prohibited Trade and Dealings) (Channel Islands) Order 1967 (1967/19)

Southern Rhodesia (Prohibited Trade and Dealings) (Isle of Man) Order 1967 (1967/20)

Southern Rhodesia (Prohibited Trade and Dealings) (Overseas Territories) (Amendment) Order 1967 (1967/248)

Southern Rhodesia (United Nations Sanctions) (Overseas Territories) Order 1968 (1968/1094)

Southern Rhodesia (United Nations Sanctions) (Dominica) Order 1969 (1969/593)

Southern Rhodesia (United Nations Sanctions) (Channel Islands) Order 1969 (1969/860)

Southern Rhodesia (United Nations Sanctions) (Isle of Man) Order 1969 (1969/861)

Southern Rhodesia (United Nations Sanctions) (St. Lucia) Order 1970 (1970/286)

Southern Rhodesia (United Nations Sanctions) (Channel Islands) (Amendment) Order 1972 (1972/1584)

Southern Rhodesia (United Nations Sanctions) (Isle of Man) (Amendment) Order (1972/1585).

South Africa (United Nations Arms Embargo) (Prohibited Transactions) Order 1978 (1978/277)

South Africa (United Nations Arms Embargo) (Prohibited Transactions) (Amendment) Order 1978 (1978/1034)

South Africa (United Nations Arms Embargo) (Prohibited Transactions) (Guernsey) Order 1978 (1978/1052)

South Africa (United Nations Arms Embargo) (Prohibited Transactions) (Isle of Man) Order 1978 (1978/1053)

South Africa (United Nations Arms Embargo) (Prohibited Transactions) (Jersey) Order 1978 (1978/1054)

South Africa (Prohibited Exports and Transactions) (Overseas Territories) Order 1978 (1978/1624)

South Africa (Prohibited Exports and Transactions) (Overseas Territories) (Amendment) Order 1978 (1978/1894)

South Africa (United Nations Arms Embargo) (Prohibited Transactions) (Amendment No. 2) Order 1978 (1978/1895)

South Africa (United Nations Arms Embargo) (Prohibited Transactions) (Guernsey) (Amendment) Order 1978 (1978/1896)

South Africa (United Nations Arms Embargo) (Prohibited Transactions) (Isle of Man) (Amendment) Order 1978 (1978/1897)

South Africa (United Nations Arms Embargo) (Prohibited Transactions) (Jersey) (Amendment) Order 1978 (1978/1898)

Southern Rhodesia (United Nations Sanctions: Islands and Overseas Territories) (Revocations) Order 1979 (1979/1655)

(H.C. Debs., vol. 983, Written Answers, cols. 371-2: 28 April 1980.)

In moving the approval by the House of Commons of the Southern Rhodesia (Sanctions) (Amnesty) Order 1980, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, Mr. Richard Luce, remarked:

The order is made under section 3 of the Southern Rhodesia Act 1979, by which power was granted to deal with the consequences of the expiry of sanctions provisions. The purpose of this order is to make provision for an amnesty, covering criminal proceedings, for offences against those measures which provided for the imposition of economic sanctions or other sanctions against Rhodesia.

... The Zimbabwe Act 1979 granted an amnesty in United Kingdom law for political offences in furtherance of, or resistance to, UDI. A similar amnesty was made by the Governor in Rhodesian law. In these circumstances, the Government consider that it would be inappropriate for any further prosecutions to be initiated for sanctions offences. This order therefore affects the last category of people involved in the sad business of UDI. There are no prosecutions for sanctions offences pending...

Past convictions are not affected by this order, nor does the order mean that the Government condone the actions of sanctions breakers. But, with the decision of the Director of Public Prosecutions not to proceed over matters arising from the



Bingham report, and in the absence of any pending proceedings, the time now appears right to complete the necessary arrangements for a comprehensive amnesty. (H.C. Debs., vol. 984, cols. 429-30: 7 May 1980; see also H.L. Debs., vol. 409, cols. 61-3: 12 May 1980.)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

Her Majesty's Government observe their obligations under the mandatory United Nations arms embargo against South Africa . . . (H.C. Debs., vol. 985, Written Answers, col. 588: 2 June 1980.)

In reply to a question, the Lord Privy Seal wrote:

The United Kingdom has already taken the legislative measures necessary to enable it to carry out fully its obligations arising from the United Nations mandatory arms embargo. All member States of the United Nations are subject to the same obligations with regard to the prohibition of the export of arms and arms technology from their territory to South Africa. (H.C. Debs., vol. 986, Written Answers, col. 301: 12 June 1980.)

**Part Thirteen: II. B. *Coercion and use of force short of war—collective measures—other collective measures***

At their meeting on 22 April 1980, the Foreign Ministers of the nine member States of the E.E.C., including the United Kingdom, issued a declaration on the American hostages in Iran which read in part:

The Foreign Ministers of the Nine, deeply concerned that a continuation of this situation may endanger international peace and security, have decided to seek immediate legislation where necessary in their national Parliaments to impose sanctions against Iran in accordance with the Security Council Resolution on Iran, dated 10th January 1980, which was vetoed, and in accordance with the tenets of international law. (H.L. Debs., vol. 408, col. 770: 23 April 1980.)

In the course of a statement on the subject of this declaration, the Secretary of State for Foreign and Commonwealth Affairs, Lord Carrington, remarked:

It is of course our hope that, at this eleventh hour, the Iranian authorities will draw the inescapable conclusion that the continued detention of the hostages is not in Iran's own interest, and should be brought to an end without delay.

If this does not happen, we shall face the situation which we contemplated when we cast our vote for the Resolution presented to the United Nations Security Council in January, except that now the action taken must be on the basis of national measures, and not on the basis of a Resolution of the Security Council of the United Nations. (Ibid., col. 769.)

Section 1 (1) of the Iran (Temporary Powers) Act 1980, which entered into force on 17 May 1980, reads:

Her Majesty may by Order in Council make such provision in relation to contracts in any way relating to or connected with Iran, being either contracts for

services or contracts for the sale, supply or transport of goods, as appears to Her to be necessary or expedient in consequence of breaches of international law by Iran in connection with or arising out of the detention of members of the embassy of the United States of America.

During a debate on the subject of the attitude towards Iran taken by the Foreign Ministers of the nine member States of the European Community, the Lord Privy Seal incorporated into his speech a declaration made by the Foreign Ministers in Naples on 17-18 May 1980. This read in part:

Consequently, they decided immediately to apply the measures provided for in the Security Council draft resolution of 10 January 1980, according to jointly agreed conditions and procedures. They agreed, in particular, that all contracts concluded after 4 November 1979 will be affected by these measures. They will continue to consult closely pursuant to Art 224 of the Treaty of Rome. (H.C. Debs., vol. 985, Written Answers, cols. 43-4: 19 May 1980.)

In moving the approval of the Iran (Trading Sanctions) Order 1980, and the Export of Goods (Control) (Iran Sanctions) Order 1980, the Minister for Trade, Mr. Cecil Parkinson, stated:

I remind the House why we are seeking approval for the two orders to implement sanctions against Iran. At Luxembourg on 22 April Community Foreign Ministers agreed to proceed with economic sanctions in conformity with the draft United Nations Security Council resolution which was vetoed by the USSR on 13 January.

They agreed that if there was no decisive progress on the release of the hostages by 17 May they would meet again and decide what action to take towards enforcing that Security Council resolution. They decided in the meantime to take a number of political steps. In accordance with the commitment made by the Foreign Secretary, the Government secured the passage of the Iran (Temporary Powers) Act 1980 and at Naples on 18 May the Foreign Ministers of the Nine decided to make the necessary orders to implement the sanctions. (H.C. Debs., vol. 985, col. 1577: 4 June 1980.)

In moving the approval of the Iran (Trading Sanctions) Order 1980 and the Export of Goods (Control) (Iran Sanctions) Order 1980, the Government Minister in the House of Lords, Lord Trefgarne, stated:

... may I first remind your Lordships why we are seeking approval of these two orders to implement sanctions against Iran. On 22nd April at Luxembourg the Community Foreign Ministers agreed to proceed with economic sanctions in conformity with the draft UN Security Council resolution vetoed by the Soviet Union on 13th January, if there was no decisive progress on the release of the hostages by 17th May. They decided in the meantime to take any necessary powers to implement the sanctions.

In accordance with this commitment the Government secured passage of the Iran (Temporary Powers) Act 1980 to supplement the powers we already have under the Import, Export and Customs Powers (Defence) Act 1939. At Naples on 18th May the Foreign Ministers of the Nine decided to make the necessary orders to implement the sanctions.

... The Government ... decided to ensure that the orders would not apply to the export of goods under arrangements made before the date of the orders. ... Our partners in the Community all took action on 22nd May, by means of decrees or other regulations in accordance with their own legislation. Japan and some other countries have also taken action. We ourselves decided to implement our sanctions with effect from 30th May, the earliest practicable date under our parliamentary and statutory procedures. (H.L. Debs., vol. 410, cols. 136-7: 9 June 1980.)

**Part Fourteen: I. A. 3. *Armed conflicts—international war—resort to war—limitation and reduction of armaments***

In reply to a question, the Lord Privy Seal wrote:

The modified Brussels Treaty of 1954 includes an undertaking by the Federal Republic of Germany not to manufacture in its territory certain types of weapons including warships, with the exception of smaller ships for defence purposes. The types of warships were specified in paragraph V of annex III of protocol III of the Treaty. Between 1958 and 1973 that paragraph was amended five times in accordance with provisions for amendment or cancellation laid down in the Treaty. At a meeting on 21 July the Western European Union Council agreed unanimously to a request from the Federal Republic of Germany that the paragraph be cancelled. The request was supported by a recommendation from the Supreme Allied Commander Europe.

The effect of the decision is to lift the remaining restrictions in the Treaty on the construction of warships in the Federal Republic of Germany. (H.C. Debs., vol. 989, Written Answers, col. 265: 23 July 1980.)

In reply to a question on the subject of the United Nations conference on certain conventional weapons, concluded in Geneva on 10 October 1980, the Minister of State, Foreign and Commonwealth Office, wrote:

The Government welcome the outcome of this conference. The agreement reached there contains the first restrictions on the use of conventional weapons adopted internationally for over 70 years. These new controls on mines and booby-traps, incendiary weapons, and weapons with fragments not detectable by X-ray, have genuine humanitarian value.

The mines protocol is largely based on a British draft tabled at an earlier stage of the conference. The final text of the convention, to which the three protocols are attached, is based on a draft elaborated jointly by the United Kingdom and Netherlands delegations. (H.C. Debs., vol. 991, Written Answers, col. 237: 28 October 1980; see also H.L. Debs., vol. 413, col. 1924: 21 October 1980.)

**Part Fourteen: I. B. 8. *Armed conflicts—international war—the laws of war—belligerent occupation***

In the course of a debate in the Security Council of the United Nations, the leader of the United Kingdom delegation, Sir Anthony Parsons, stated:

... we consider the Israeli claim to ultimate sovereignty over those territories to be



incompatible with Security Council resolution 242 (1967) and the principle of the inadmissibility of the acquisition of territory by force. It follows, therefore, that we view recent Israeli decisions concerning the City of Hebron to be both provocative and ill-conceived.

. . . Earlier speakers have mentioned other problems arising from the Israeli administration of the occupied territories. I repeat that, in our view, the Fourth Geneva Convention of 1949 confers specific responsibilities on the occupying Power and expressly prohibits any unilateral modification of the demographic and physical nature of the territories in question. We continue to oppose any such unilateral modifications, including those to the status of Jerusalem and the Holy Places. (S/PV. 2201, pp. 48-50: 26 February 1980.)

In reply to a question asking for Her Majesty's Government's policy in relation to the West Bank of the River Jordan, the Minister of State, Foreign and Commonwealth Office, wrote:

We regard the West Bank as occupied territory from which, as part of a peace settlement and subject to any minor border rectifications negotiated between the parties, Israel will have to withdraw in accordance with Security Council resolution 242. The future of the West Bank after Israeli withdrawal is a matter for negotiation between the parties directly concerned. (H.C. Debs., vol. 984, Written Answers, col. 502: 14 May 1980.)

In a Declaration on the Middle East, issued by the European Council (including the United Kingdom) at its Venice meeting on 12 and 13 June 1980, it was stated:

8. The Nine recognise the special importance of the role played by the question of Jerusalem for all the parties concerned. The Nine stress that they will not accept any unilateral initiative designed to change the status of Jerusalem and that any agreement on the city's status should guarantee freedom of access for everyone to the Holy Places.

9. The Nine stress the need for Israel to put an end to the territorial occupation which it has maintained since the conflict of 1967, as it has done for part of Sinai. They are deeply convinced that the Israeli settlements constitute a serious obstacle to the peace process in the Middle East. The Nine consider that these settlements, as well as modifications in population and property in the occupied Arab territories, are illegal under international law. (H.L. Debs., vol. 410, col. 846: 16 June 1980; H.C. Debs., vol. 986, col. 1144: 16 June 1980.)

In the course of his speech in the Security Council on 30 June 1980, the leader of the United Kingdom delegation, Sir Anthony Parsons, stated:

My Government's position is clear and I believe it is no secret to the council. East Jerusalem is part of the territories occupied in the war of 1967. It is subject to the principles emphasised in Resolution 242 including the inadmissibility of the acquisition of territory by war.

We have consistently maintained our policy that no unilateral action should or can change the status of Jerusalem. No such action should be allowed to prejudice the future of that city.

This position was most recently reaffirmed in the Declaration by the nine heads

of State and Government of the European Community in Venice on 13 June when they stressed:

‘That they will not accept any unilateral initiative designed to change the status of Jerusalem and that any agreement on the city’s status should guarantee freedom of access for everyone to the Holy Places.’ (Text provided by the Foreign and Commonwealth Office.)

In reply to a question, the Lord Privy Seal wrote:

Since the end of the Palestine mandate, successive British Governments have regarded the status of Jerusalem as a whole as undetermined and taken the view that the city’s future should be agreed between all the parties concerned and cannot be determined unilaterally. We regard East Jerusalem as part of the territories occupied by Israel in 1967 and therefore as subject to the provision of resolution 242 for Israel’s withdrawal. (H.C. Debs., vol. 988, Written Answers, col. 563: 16 July 1980.)

In the course of answering a question on the subject of the resolution of the Security Council on the future of Jerusalem, the Secretary of State for Foreign Affairs, Lord Carrington, stated:

My Lords, Security Council Resolution 476, passed on 30th June, reaffirmed that no unilateral action should, or can, change the status of Jerusalem, and called for Israel to rescind all such unilateral actions. (H.L. Debs., vol. 412, col. 1: 21 July 1980.)

In reply to a question about the treatment by Israel of the Arab population of the occupied territories, the Minister of State, Foreign and Commonwealth Office, wrote:

The Israeli authorities have been left in no doubt of our view that the fourth Geneva convention on the responsibilities of occupying powers is applicable to the territories occupied by Israel in 1967 and that we deplore violations of it, in particular the continuing policy of settlement of the territories. (H.C. Debs., vol. 989, Written Answers, cols. 810–11: 31 July 1980.)

In reply to the question whether Her Majesty’s Government intended to recognize the transfer of the Israeli Prime Minister’s Office to East Jerusalem, the Lord Chancellor, Lord Hailsham, stated:

British Governments have taken the view since the 1967 conflict that Israel’s rights in East Jerusalem do not extend beyond those of an occupying power, pending an agreed solution on the city’s future. It follows that we do not accept that Israel has the right to establish government offices there. (H.L. Debs., vol. 412, col. 1177: 1 August 1980.)

In reply to a member of the public who had inquired about the ban on flights by British airlines to Etzion airport in Sinai, the Foreign and Commonwealth Office wrote in reply on 10 November 1980:

Etzion Airport lies in occupied Egyptian territory, and we cannot give permission for its use without Egyptian agreement. On receiving formal applications for its

use by the airlines you mention we approached the Egyptian government who were unable to agree. As a result the Department of Trade had no choice but to make it clear to those concerned that licences to fly to Eilat itself could not be extended to cover Etzion. (Text provided by the Foreign and Commonwealth Office.)

**Part Fourteen: I. B. 10. *Armed conflicts—the laws of war—nuclear, bacteriological and chemical weapons***

In reply to a question about Her Majesty's Government's actions to carry out the nuclear non-proliferation agreement, the Prime Minister wrote:

As a depository power the United Kingdom has worked hard to encourage wider adherence to the non-proliferation treaty, which requires parties to accept the International Atomic Energy Authority's safeguards on all activities. The Government are careful fully to observe the requirement under the treaty not to assist any non-nuclear weapons states to manufacture nuclear weapons or other nuclear explosive devices and accordingly exercise the tightest controls on the export of designated nuclear items and materials. These controls are kept under continuous review and updated as necessary. (H.C. Debs., vol. 978, Written Answers, cols. 385-6: 8 February 1980.)

In reply to a question about alleged experiments in chemical warfare conducted by the Soviet Union, the Government Minister, Lord Trefgarne, stated in part:

. . . we need to distinguish between chemical warfare and biological warfare because they are covered by different conventions. The current convention in connection with chemical warfare dates from as long ago as 1925—a Geneva Convention of that year. Biological warfare, however, . . . stems from the 1975 convention banning that particular group of weapons. Certainly the recent reported incident in Russia, if it did occur, was covered by the 1975 Biological Convention, and that is the matter which the United States Government have recently taken up with the Soviet Union. (H.L. Debs., vol. 407, cols. 789-90: 26 March 1980.)

In reply to a question, the Prime Minister wrote:

The Governments of France and China are well aware of our view that it would be desirable for all states to adhere to the 1963 treaty banning nuclear weapon tests in the atmosphere, in outer space and under water, of which we are a depository Government. (H.C. Debs., vol. 995, Written Answers, col. 386: 4 December 1980.)

In reply to a question concerning the Convention on the Physical Protection of Nuclear Material, the Parliamentary Under-Secretary of State, Department of Energy, wrote:

Cmnd. 8112 . . . contains the text of the convention, which was prepared under the auspices of The International Atomic Energy Agency (IAEA) and opened for signature in Vienna and New York on 3 March this year. The convention will come into force 30 days after 21 countries have ratified it.



Under the convention, which applies to civil nuclear material, a signatory will be obliged to:

- (a) take steps to ensure that nuclear material in the course of international transport is protected to specified levels while under its jurisdiction;
- (b) not to export or import such material except on the basis of assurances that it will be so protected during transport outside its jurisdiction;
- (c) to co-operate on request with other parties on the recovery of material should it be stolen;
- (d) take steps to ensure that certain specified offences which are broadly concerned with the unlawful taking, possession and use of such material, including in certain circumstances an attempt to commit such offences, is punishable under its law; to enable the courts to exercise more extensive jurisdiction over such offences; and to provide for the extradition of persons accused or convicted of committing these offences.

26 countries have so far signed the Convention, including the United Kingdom, all other members of the European Atomic Energy Community (Euratom). The European Commission has signed on behalf of the Community. One country has ratified it so far.

It is the Government's intention to ratify the convention when the necessary legislation to amend our criminal law, to extend the jurisdiction of our courts and to amend our extradition law has been enacted. My right hon. Friend the Secretary of State for the Home Department will introduce legislation for this purpose in due course.

With regard to the physical protection standards set out in the convention, these correspond to those described in existing guidance by the IAEA. The United Kingdom has always subscribed to these. The convention's standards have therefore been applied for a number of years to civil nuclear material under United Kingdom jurisdiction. (H.C. Debs., vol. 996, Written Answers, cols. 129-31: 16 December 1980.)

**Part Fifteen: I. A. *Neutrality, non-belligerency—legal nature of neutrality—land warfare***

In the course of a debate on 15 October 1980 in the Sixth Committee of the United Nations General Assembly on the subject of mercenaries, the United Kingdom representative, Mr. D. H. Anderson, stated:

The question of mercenaries should be placed in the context of the law on neutrality. The rules of international law on the rights and duties of neutral States had developed in the nineteenth century. In 1870 the United Kingdom had enacted the Foreign Enlistment Act, which prohibited British subjects from engaging in certain activities in foreign States, in order to fulfil the obligations of the United Kingdom as a neutral State in respect of foreign conflicts. In 1907, article 4 of the Fifth Hague Convention respecting the Rights and Duties of Neutral Powers and Persons in War on Land had forbidden the formation of corps of combatants and the opening of recruiting offices on behalf of belligerents on the territory of a neutral Power. However, article 6 of the same Convention qualified the interdiction by stating that a neutral Power did not incur responsibility by the fact that persons crossed the frontier singly in order to place themselves at the service of one of the belligerents. In 1928, the sixth international conference of

American States had adopted the Convention on the Duties and Rights of States in the Event of Civil Strife, under article 1 of which the parties bound themselves to use all means at their disposal to prevent the inhabitants of their territory, whether nationals or aliens, from crossing the boundary or sailing from their territory for the purpose of starting or promoting civil strife.

In more modern times, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations upheld the non-use of force and specified that it was the duty of States to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State. Article 3 (g) of the Definition of Aggression gave, as an example of an act of aggression, the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carried out acts of armed force against another State. As previous speakers had noted, article 47 of Additional Protocol I to the 1949 Geneva Conventions contained a definition of the term 'mercenary', as well as substantive provisions concerning the status of mercenaries who took part in armed conflicts. The Security Council had also, on various occasions, called for measures to prevent the departure of military personnel, including mercenaries, for the purpose of becoming involved in specific conflicts. Thus, the rules of international law concerning the non-use of force in international relations, and concerning neutrality, already imposed obligations on States with regard to the dispatch of mercenaries to the territory of another State.

... It was also essential that clarity should prevail when seeking a definition of mercenaries. The definition contained in article 47 of Additional Protocol I to the Geneva Conventions had been adopted by consensus in 1977, and was probably the best definition which the international community could agree on. His own delegation continued to attach the utmost importance to the point that a person who was a member of the armed forces of a party to a conflict was not to be regarded as a mercenary, irrespective of his nationality (article 47, 1 (e)). (A/C.6/35/SR. 21, pp. 10-11.)

### **Part Fifteen: III. *Neutrality, non-belligerency—neutrality as State policy***

In reply to the question what were Her Majesty's Government's obligations in an event of a breach of the neutrality of Austria, the Lord Privy Seal wrote:

The legal basis of Austria's neutrality is the constitutional law on neutrality passed by the Austrian Parliament on 26 October 1955. Her Majesty's Government have no specific obligations in international law relating to a breach of this neutrality. (H.C. Debs., vol. 983, Written Answers, col. 372: 28 April 1980.)

## APPENDICES

I. MULTILATERAL AGREEMENTS SIGNED BY THE UNITED KINGDOM IN 1980<sup>1</sup>

<i>Title</i>	<i>Place and Date</i>	<i>Signatures etc.</i>	<i>Text</i>
Labour Administration Convention, 1978 (I.L.O. Convention No. 150) Entered into force 11.10.1980	Adopted Geneva, 26.6.1978	U.K. ratification 19.3.1980 (E.D.* 19.3.1981) Also ratified by Sweden, Gabon, Israel, Finland, Norway, Upper Volta Applied to: Gibraltar without modification 11.8.1980; St. Helena without modification 11.8.1980; Brunei with modification re Art. 5 27.10.1980; Belize with modification re Art. 7 27.10.1980 Decision reserved: Montserrat 27.10.1980	Dept. of Employment (Cmnd. 7786)
Labour Relations (Public Service) Convention, 1978 (I.L.O. Convention No. 151) Entered into force 25.2.1981	Adopted Geneva, 27.6.1978	U.K. ratification 19.3.1980 (E.D. 19.3.1981) Also ratified by Sweden, Finland, Norway Applied to: Gibraltar without modification 11.8.1980; St. Helena without modification 11.8.1980; Belize with modification re Art. 5 (2) 27.10.1980; To be applied without modification to Hong Kong Decision reserved: Montserrat 27.10.1980; Brunei 27.10.1980	Dept. of Employment (Cmnd. 7786)
Amendments to the Plant Protection Agreement for the South East Asia, and Pacific Region, signed at Rome on 27.2.1956 Not yet in force	Adopted Rome, June 1979 (F.A.O.)	U.K. acceptance 9.4.1980 Acceptance also by India, Pakistan	Not to be published as Command Paper
Food Aid Convention, 1980	Washington, 11.3.1980	U.K. signature 30.4.1980 Declaration of provisional application: 30.6.1980 Many other signatures	Misc. No. 20 (1980) (Cmnd. 8009)

<sup>1</sup> Table supplied by the Foreign and Commonwealth Office. The information is correct as at January 1981, although in some cases information available since that

date has been included.  
\* E.D. = effective date.



<i>Title</i>	<i>Place and Date</i>	<i>Signatures etc.</i>	<i>Text</i>
European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (Council of Europe No. 105) Not yet in force	Luxembourg, 20.5.1980	U.K. signature 20.5.1980 (with reservation re Arts. 8, 9, 10 (1) a, b, c and d). Other signatories 20.5.1980: Austria, Belgium, Cyprus, France, F.R. Germany, Greece, Ireland, Italy (with declaration), Liechtenstein, Luxembourg, Netherlands, Portugal, Spain, Switzerland	Misc. No. 6 (1981) (Cmnd. 8155)
International Convention on Maritime Search and Rescue, 1979 (done at Hamburg on 27.4.1979)	London (I.M.C.O.), 1.11.1979	U.K. signature 22.5.1980* (ratification not required) Other signatories: 6.11.1979 F.R. Germany; <sup>1</sup> 14.11.1979 Switzerland; <sup>1</sup> 6.11.1979 U.S.A.; <sup>1</sup> 9.4.1980 France (ratification not required); 20.8.1980 Greece <sup>1</sup> (with reservation); 11.9.1980 P.R. China; <sup>2</sup> 10.10.1980 Denmark; <sup>1</sup> 13.10.1980 Poland; <sup>1</sup> 24.10.1980 Turkey <sup>1</sup> (objects to Greek reservation); 27.10.1980 Netherlands; <sup>3</sup> 31.10.1980 Chile (ad referendum); 31.10.1980 U.S.S.R. <sup>1</sup>	Misc. No. 19 (1980) (Cmnd. 7994)
Convention on the Physical Protection of Nuclear Materials Not yet in force	Vienna (I.A.E.A.) and New York (U.N.), 3.3.1980	U.K. signature 13.6.1980 Many other signatories	Misc. 27 (1980) (Cmnd. 8112)
Protocol to the Agreement on the Importation of Educational, Scientific and Cultural Materials, of 22.11.1950 (Adopted at Nairobi on 26.11.1976, with Procès-verbal of Rectification of English Text) Not yet in force	New York (U.N.) 1.3.1977	U.K. signature 18.6.1980 (with declaration) Many other signatories and accessions	Misc. 25 (1980) (Cmnd. 8100)
International Rubber Agreement, 1979 Provisionally entered into force 23.10.1980	New York (U.N.), 2.1.1980	U.K. signature 27.6.1980 Provisional application 26.9.1980 Many other signatories	Misc. 21 (1980) (Cmnd. 8018)

\* With declaration that the Convention will not enter into force for *Gibraltar* until 30 days after the date on which the U.K. notify I.M.C.O. that measures required to implement the Convention in Gibraltar have been taken.  
U.K. signature in respect of U.K., the Bailiwick of Jersey, the Bailiwick of

Guernsey, the Isle of Man, St. Kitts-Nevis-Anguilla, Belize, Bermuda, British Virgin Islands, Gibraltar and Hong Kong.

<sup>1</sup> Subject to ratification.

<sup>3</sup> Subject to acceptance.

<sup>2</sup> Subject to approval.

Additional Protocol to the European Convention for the Protection of Animals during International Transport, of 13.12.1968 (Council of Europe No. 103) Not yet in force	Strasbourg, 10.5.1979	U.K. signature 22.7.1980 extends to Isle of Man and Gibraltar (ratification not required) Other signatories: 10.5.1979 Austria, <sup>1</sup> Belgium (ratified 11.3.1980), France (ratification not required), F.R. Germany (ratified 16.1.1981 — also applies to Berlin (West)), Luxembourg (ratified 11.9.1980), Sweden (ratification not required), Switzerland (ratification not required); 20.6.1979 Denmark (ratification not required); 19.2.1980 Italy; <sup>1</sup> 4.9.1980 Netherlands; <sup>1</sup> 6.10.1980 Ireland (and ratification); 16.10.1980 Portugal	Misc. No. 22 (1980) (Cmnd. 8040)
Convention on the Conservation of Antarctic Marine Living Resources, with Final Act of Conference Not yet in force	Canberra, 1.8.1980	U.K. signature 11.9.1980 Other signatories: 11.9.1980 Argentina, Australia, Belgium, Chile, German Dem. Rep., F.R. Germany, New Zealand, Norway, Poland, S. Africa, U.S.S.R., U.S.A.; 12.9.1980 Japan; 16.9.1980 France	Misc. No. 9 (1981) (Cmnd. 8127)
Amendment to the International Convention on Load Lines, 1966	London (I.M.C.O.), 15.11.1979	U.K. acceptance 22.9.1980 (also on behalf of Bermuda and Hong Kong) Other acceptances: 11.3.1980 Maldives; 12.5.1980 France; 22.5.1980 Denmark; 1.8.1980 P.R. China; 17.10.1980 Sweden; 25.9.1980 Morocco; 1.10.1980 Seychelles; 10.11.1980 Australia; 27.11.1980 Sri Lanka; 20.11.1980 Netherlands (and Antilles)	Misc. No. 14 (1980) (Cmnd. 7914)
European Agreement on Transfer of Responsibility for Refugees (Council of Europe No. 107) Entered into force 1.12.1980	Strasbourg, 16.10.1980	U.K. signature 16.10.1980 Other signatures 16.10.1980: Belgium, Denmark, F.R. Germany, Greece, Portugal, Switzerland (all with reservation in respect of ratification or acceptance) Norway (ratification not required), Sweden (ratification not required)	Misc. No. 3 (1981) (Cmnd. 8127)

<sup>1</sup> Subject to ratification or acceptance.

<i>Title</i>	<i>Place and Date</i>	<i>Signatures etc.</i>	<i>Text</i>
Amendment to Article XI of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed at Washington on 3.3.1973 Not yet in force	Adopted Bonn, 22.6.1979	U.K. acceptance 28.11.1980 (also on behalf of the Bailiwick of Jersey, the Bailiwick of Guernsey, the Isle of Man, Belize, Bermuda, British Indian Ocean Territories, British Virgin Islands, Cayman Islands, Falkland Islands and Dependencies, Gibraltar, Hong Kong, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, St. Helena and Dependencies) Other acceptances: 18.12.1979 Norway; 30.1.1980 Canada; 5.2.1980 India; 25.2.1980 Sweden; 6.8.1980 Japan; 7.5.1980 F.R. Germany; 23.9.1980 Mauritius; 23.10.1980 U.S.A.; 19.11.1980 Botswana	Not yet published
Merchant Shipping (Minimum Standards) Convention, 1976 (I.L.O. Convention No. 147)	Adopted Geneva, 29.10.1976	U.K. ratification 28.11.1980 (E.D. 28.11.1981) Other ratifications: 28.4.1978 Spain; 2.5.1978 France; 2.10.1978 Finland; 20.10.1978 Sweden; 25.1.1979 Netherlands; 24.1.1979 Norway; 18.9.1979 Greece; 28.7.1980 Denmark; 14.7.1980 F.R. Germany	Dept. of Employment (Cmnd. 7163)
Additional Protocol to the European Convention on Information on Foreign Law (of June 1968) (Council of Europe No. 97) Entered into force 31.8.1979	Strasbourg, 15.3.1978	U.K. signature 2.12.1980 (with reservation in respect of ratification) Ratifications: 30.5.1979 Belgium (E.D. 31.8.1979); 11.10.1979 Denmark (E.D. 12.1.1980); 2.11.1978 Norway; 25.2.1980 Austria (E.D. 26.5.1980); 31.8.1979 Cyprus (E.D. 31.8.1979) (bound only by Chapter I); 3.6.1980 Netherlands (Kingdom in Europe) (bound only by Chapter I) Signatures with reservation in respect of ratification or acceptance: 15.3.1978 France; 12.4.1978 Austria; 21.4.1978 F.R. Germany; 26.4.1978 Iceland; 20.12.1978 Greece; 31.5.1979 Italy; 22.11.1979 Portugal; 1.9.1980 Turkey	Misc. No. 5 (1981) (Cmnd. 8149)



Agreement establishing the Common Fund for Commodities Not yet in force	Adopted Geneva, 27.6.1980 Opened for signature New York, 1.10.1980	U.K. signature 16.12.1980 (with declaration re voluntary contribution) Other signatures: 1.10.1980 Indonesia, Netherlands; 3.10.1980 Ecuador; 27.10.1980 Denmark, Finland, Norway, Sweden; 4.11.1980 France; 5.11.1980 P.R. China, U.S.A.; 28.11.1980 Japan; 5.12.1980 Venezuela (reservation re Art. 53); 17.12.1980 Italy; 19.12.1980 Mexico; 23.12.1980 Bangladesh; 29.12.1980 Luxembourg; 30.12.1980 Malaysia	Misc. No. 7 (1981) (Cmnd. 8192)
--	---	--	------------------------------------

II. BILATERAL AGREEMENTS SIGNED BY THE UNITED KINGDOM IN 1980<sup>1</sup>

<i>Country and Title</i>	<i>Place and date</i>	<i>Entry into force</i>	<i>Text</i>
AUSTRALIA Protocol amending the Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, signed at Canberra on 7 December 1967	Canberra, 29 January 1980	On completion of procedures	Not yet published
AUSTRIA Convention on Social Security (with Protocol concerning Benefits in Kind)	Vienna, 22 July 1980	1 May 1981	T.S. <sup>2</sup> No. 25 (1981) (Cmnd. 8231)
BANGLADESH Agreement for the Promotion and Protection of Investments	London, 19 June 1980	On signature	T.S. No. 73 (1980) (Cmnd. 8013)
CANADA Exchange of Notes concerning Transport Assistance by the Canadian Armed Forces to the Election Observers in Southern Rhodesia	London, 7 and 9 March 1980	9 February 1980	Not published
Protocol amending the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains, signed at London on 8 September 1978	Ottawa, 15 April 1980	17 December 1980	Canada No. 1 (1980) (Cmnd. 8024)

<sup>1</sup> Table supplied by the Foreign and Commonwealth Office. The information is correct as at January 1981, although in some cases information available since that

date has been included.

<sup>2</sup> T.S. = United Kingdom Treaty Series.

<i>Country and Title</i>	<i>Place and date</i>	<i>Entry into force</i>	<i>Text</i>
CYPRUS			
Protocol amending the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion, signed in Nicosia on 20 June 1974	Nicosia, 2 April 1980	15 December 1980	Cyprus No. 1 (1980) (Cmnd. 8035)
Agreement on the International Carriage of Goods by Road	London, 9 September 1980	On completion of procedures	Cyprus No. 2 (1980) (Cmnd. 8076)
DENMARK			
Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains	Copenhagen, 11 November 1980	17 December 1980	T.S. No. 20 (1981) (Cmnd. 8211)
FINLAND			
Protocol amending the Convention on Social Security signed at London on 12 December 1978	London, 21 March 1980	When the Convention comes into Force	Finland No. 1 (1980) (Cmnd. 8113)
THE GAMBIA			
Exchange of Notes amending the British Expatriates Supplementation (The Gambia) Agreement 1976	Banjul, 3 and 4 March 1980	1 September 1979	T.S. No. 67 (1980) (Cmnd. 7999)
Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains	London, 20 May 1980	On completion of procedures	Not yet published
GERMAN DEMOCRATIC REPUBLIC			
Convention regarding Legal Proceedings in Civil Matters	Berlin, 28 February 1980	21 February 1981	T.S. No. 28 (1981) (Cmnd. 8240)
GERMANY, Federal Republic of			
Exchange of Notes disapplying the provision of Article 31 of the Consular Convention of 30 July 1956 which provides for Mutual Assistance in the recovery of Merchant Seamen Deserters	Bonn, 22 and 23 May 1980	23 May 1980	T.S. No. 66 (1980), p. 6 (Cmnd. 8025)
GREECE			
Exchange of Notes terminating the Provisions of Article 27 of the Consular Convention signed at Athens on 17 April 1953	Athens, 20 and 26 February 1980	26 February 1980	T.S. No. 45 (1980), p. 12 (Cmnd. 7949)

HONDURAS				
Exchange of Notes concerning Capital Aid Loan (United Kingdom/Honduras Loan 1980)	Tegucigalpa, 11 September and 24 December 1980	24 December 1980	T.S. No. 24 (1981) (Cmnd. 8230)	
IRELAND, Republic of				
Agreement on the International Carriage of Goods by Road	Dublin, 9 April 1980	1 July 1980	T.S. No. 74 (1980) (Cmnd. 8015)	
JAPAN				
Protocol amending the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, signed at Tokyo on 10 February 1969	Tokyo, 14 February 1980	31 October 1980	T.S. No. 88 (1980) (Cmnd. 8072)	
KENYA				
Exchange of Notes amending the Public Officers' Pensions (Kenya) Agreement 1977	Nairobi, 9 and 19 September 1980	19 September 1980	T.S. No. 8 (1981) (Cmnd. 8152)	
MOROCCO				
Cultural Agreement	Rabat, 27 October 1980	On exchange of ratifications	Morocco No. 1 (1981) (Cmnd. 8140)	
MOZAMBIQUE				
Exchange of Notes amending the U.K./Mozambique Pro- gramme Loan 1976, signed at Maputo on 17 August 1976	Maputo, 1 and 21 April 1980	21 April 1980	T.S. No. 91 (1980), p. 4. (Cmnd. 8090)	
NEPAL				
Exchange of Notes constituting the U.K./Nepal Retrospective Terms Agreement	Kathmandu, 26 and 28 February 1980	28 February 1980	T.S. No. 78 (1980) (Cmnd. 8023)	
THE NETHERLANDS				
Exchange of Notes concerning an Understanding with respect to Article X of the Convention for the Reciprocal Admission of Consuls of the one Party to the Colonies and Foreign Possessions of the Other, signed at The Hague on 6 March 1856	The Hague, 27 February 1980	27 February 1980	Not published	
Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains	The Hague, 7 November 1980	3 days after completion of procedures	Not yet published	



<i>Country and Title</i>	<i>Place and date</i>	<i>Entry into force</i>	<i>Text</i>
NEW ZEALAND			
Protocol amending the Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income signed at Wellington on 13 June 1966	London, 25 March 1980	On completion of procedures	New Zealand No. 1 (1980) (Cmnd. 7954)
NORWAY			
Protocol further amending the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital, signed at London on 22 January 1969, as amended by the Protocol signed at London on 23 June 1977 and by the Protocols signed at Oslo on 29 March 1978 and 16 October 1979 (Art. 31D Murchison Field Reservoir)	London, 30 September 1980	On completion of procedures	Not yet published
PHILIPPINES			
Exchange of Notes concerning a Loan (U.K./Philippines Loan 1980)	Manila, 12 March 1980	12 March 1980	T.S. No. 55 (1980) (Cmnd. 7957)
Exchange of Notes further amending the Agreement for Air Services between and beyond their respective Territories, signed at Manila on 31 January 1955	Manila, 14 January and 25 February 1980	25 February 1980	T.S. No. 65 (1980) (Cmnd. 7986)
Exchange of Notes concerning a Loan (U.K./Philippines Loan No. 2 1980)	Manila, 23 September 1980	23 September 1980	T.S. No. 94 (1980) (Cmnd. 8096)
Agreement for the Promotion and Protection of Investments	London, 3 December 1980	2 January 1981	T.S. No. 7 (1981) (Cmnd. 8148)
POLAND			
Exchange of Notes amending the Schedule annexed to the Agreement on Civil Air Transport, signed at Warsaw on 2 July 1960	Warsaw, 12 December 1979 and 30 January 1980	30 January 1980	T.S. No. 48 (1980) (Cmnd. 7929)
SENEGAL			
Agreement for the Promotion and Protection of Investments	London, 7 May 1980	On completion of procedures	Senegal No. 1 (1980) (Cmnd. 8079)

SIERRA LEONE Agreement on Certain Commercial Debts	Freetown, 30 June 1980	30 June 1980	T.S. No. 12 (1981) (Cmnd. 8163)
SINGAPORE Exchange of Notes further amending the Agreement for Air Services, signed at Singapore on 12 January 1971, as amended	Singapore, 28 March 1980	28 March 1980	T.S. No. 64 (1980) (Cmnd. 7988)
SPAIN Exchange of Notes constituting an agreement concerning Privileges and Immunities for participants in the Conference on Security and Cooperation in Europe (C.S.C.E.) being held in Madrid. (The privileges and immunities are those set out in the U.N. Convention on Special Missions.)	Madrid, 13 August/2 September 1980	10 October 1980	T.S. No. 96 (1980) (Cmnd. 8172), p. 23
SRI LANKA Agreement for the Promotion and Protection of Investments	Colombo, 13 February 1980	18 December 1980	T.S. No. 14 (1981) (Cmnd. 8186)
SUDAN Agreement on Certain Commercial Debts	Khartoum, 25 August 1980	25 August 1980	T.S. No. 4 (1981) (Cmnd. 8119)
SWEDEN Exchange of Notes amending the Extradition Treaty, signed at London on 26 April 1963, as amended by the Protocol of 6 December 1965 Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Estates of Deceased Persons and Inheritances and on Gifts	Stockholm, 19 February 1980  Stockholm, 8 October 1980	19 May 1980  30 days after exchange of ratifications	T.S. No. 53 (1980) (Cmnd. 7946)  Sweden No. 1 (1981) (Cmnd. 8122)
TANZANIA Agreement for Air Services between and beyond their Territories	Dar es Salaam, 1 July 1980	Provisionally on signature. Definitively on completion of procedures	Tanzania No. 1 (1981) (Cmnd. 8229)

<i>Country and Title</i>	<i>Place and Date</i>	<i>Entry into force</i>	<i>Text</i>
THAILAND Exchange of Notes further amending the Schedules to the Agreement for Air Services of 10 November 1950	Bangkok, 22 May and 30 June 1980	30 June 1980	T.S. No. 82 (1980) (Cmnd. 8051)
TOGO Agreement on certain Commercial Debts	Lomé, 18 June 1980	18 June 1980	T.S. No. 95 (1980) (Cmnd. 8094)
TURKEY Exchange of Notes concerning a Loan (The U.K./Turkey Programme Loan 1980) Agreement on Certain Commercial Debts	Ankara, 29 May 1980  Ankara, 5 December 1980  Ankara, 5 December 1980	29 May 1980  On completion of procedures 5 December 1980	T.S. No. 72 (1980) (Cmnd. 8004)  Turkey No. 1 (1981) (Cmnd. 8189)  T.S. No. 16 (1981) (Cmnd. 8200)
Exchange of Notes concerning a Refinancing Loan Agreement (U.K./Turkey Refinancing Loan Agreement (No. 1) 1980)	Ankara, 5 December 1980	5 December 1980	T.S. No. 23 (1981) (Cmnd. 8213)
Exchange of Notes concerning a Refinancing Loan Agreement (U.K./Turkey Refinancing Loan Agreement (No. 2) 1980)	Ankara, 5 December 1980	5 December 1980	T.S. No. 19 (1981) (Cmnd. 8210)
Exchange of Notes concerning a Refinancing Loan Agreement (U.K./Turkey Refinancing Loan Agreement (No. 3) 1980)	Ankara, 5 December 1980	5 December 1980	T.S. No. 15 (1981) (Cmnd. 8194)
Exchange of Notes concerning the United Kingdom/Turkey (Ankara Water Project) Loan 1980	Ankara, 19 December 1980	19 December 1980	
UNITED STATES OF AMERICA Exchange of Notes between the Prime Minister and the President of the United States, and the Secretary of State for Defence and the United States Secretary of Defence concerning the British Strategic Nuclear Force	London and Washington 10-15 July 1980		Prime Minister (Cmnd. 7979)
Exchange of Notes concerning the Acquisition by the United Kingdom of the Trident I Weapons System under the Polaris Sales Agreement, signed on 6 April 1963	Washington, 30 September 1980	30 September 1980	T.S. No. 86 (1980) (Cmnd. 8070)



Exchange of Notes modifying the Agreement on the establishment on Ascension Island of additional Facility to be operated by the United States National Aeronautics and Space Administration, of 7 July 1965	London, 18 November/ 19 December 1980	19 December 1980	T.S. No. 13 (1981) (Cmnd. 8166)
Exchange of Notes further amending the Agreement concerning Air Services, signed at Bermuda on 23 July 1977	Washington, 4 December 1980	1 April 1980	T.S. No. 2 (1981) (Cmnd. 8222)
VENEZUELA			
Instrument of Friendship and Cooperation between the Government of St. Kitts-Nevis-Anguilla and the Government of the Republic of Venezuela	St. Kitts, 18 March 1980	On completion of constitutional procedures	Not to be published
MISCELLANEOUS			
Headquarters Agreement between the Government of the United Kingdom and the International Maritime Satellite Organisation	London, 25 February 1980	25 February 1980	T.S. No. 44 (1980) (Cmnd. 7917)
Exchange of Notes between the Government of the United Kingdom and the Inter-American Development Bank concerning Certain Exemptions from Duties of Customs and Excise	Washington, 20 May 1980	On completion of U.K. legislation	Misc. No. 17 (1980) (Cmnd. 8047)

III. UNITED KINGDOM LEGISLATION DURING 1980  
CONCERNING MATTERS OF INTERNATIONAL LAW<sup>1</sup>

**The Anguilla Act** (1980 c. 67) provides that Her Majesty may, by Order in Council, make provision for and in connection with the attainment by Anguilla of fully responsible status or its establishment as an independent republic (see Part Three: I. C. 4., *supra*).

**The Consular Fees Act** (1980 c. 23) re-enacts, with amendments, so much of the Consular Salaries and Fees Act 1891 as relates to consular fees, together with certain enactments amending that Act (see Part Five: V., *supra*).

**The Iran (Temporary Powers) Act** (1980 c. 28) enables Her Majesty, by Order in Council, to make such provision as appears to be necessary or expedient with respect to contracts relating to or connected with Iran, in consequence of breaches of international law by Iran in connection with or arising out of the detention of members of the embassy of the United States of America (see Parts Five: IV. and Thirteen: II. B., *supra*).

**The New Hebrides Act** (1980 c. 16) makes provision in connection with the attainment by the New Hebrides of independence within the Commonwealth (see Part Three: III. E., *supra*).

**The Papua New Guinea, Western Samoa and Nauru (Miscellaneous Provisions) Act** (1980 c. 2) makes provision in connection with the attainment of Papua New Guinea of independence within the Commonwealth and with the membership of the Commonwealth of Western Samoa and Nauru (see UKMIL 1979, pp. 318-19).

**The Protection of Trading Interests Act** (1980 c. 11) provides protection from requirements, prohibitions and judgments imposed or given under the laws of countries outside the United Kingdom and affecting the trading or other interests of persons in the United Kingdom (see Part Eight: II. D., *supra*).

<sup>1</sup> Compiled by C. A. Hopkins.

## TABLE OF CASES<sup>1</sup>

- Abu Dhabi Arbitration, 245  
 Acquisition of Polish Nationality, 153  
 Adirano Gardella S.p.A. v. Ivory Coast Government, 158  
 Admissions Case (Conditions of Admission of a State to Membership in the United Nations), 189  
 Aegean Sea Continental Shelf Case, 1, 89, 91, 94-6, 98, 103-4, 106, 108, 111, 113, 116, 133  
 Aerial Incident Cases, 90, 113, 116  
 Agnew v. Lord Advocate, 185  
 Airey Case, 280, 281, 282  
 Alabama Claims, 300  
 Alabama v. Texas, 49  
 Alcoa Case (United States v. Aluminum Co. of America), 446  
 Allgemeine Gold- und Silberscheideanstalt v. Customs and Excise Commissioners, 305-6  
 Anglo-Iranian Oil Co. Case, 90, 133, 135  
 Anglo-Norwegian Fisheries Case, 174  
 Annan (Burgh of) v. Irving, 182  
 Annandale and Eskdale District Council v. North West Water Authority, 169-72, 178, 179, 180, 184, 185, 187-8  
 Antarctica Cases, 90, 113, 116  
 Aramco Case (Arabian-American Oil Co. v. Saudi Arabia), 300  
 Argentine-Chile Frontier Case, 187  
 Arkansas v. Tennessee, 174  
 Artico Case, 332-5  
 Arton, *Re* (No. 2), 328  
 Atalanta v. Produktschap voor Vee en Vlees, 348  
 Attorney-General v. British Broadcasting Corporation, 306-9  
 Attorney-General v. Chambers, 185  
 Attorney-General v. Times Newspapers, 306  
 Attorney-General for British Columbia v. Attorney-General for Canada, 49, 167  
 Baccus S.R.L. v. Servicio Nacional del Trigo, 425-6  
 Baker v. Carr, 187  
 Bankers Trust International Ltd. v. Todd Shipyards Corporation, 325  
 Barcelona Traction, Light and Power Co. Ltd. Case, 99  
 Bayerische H.N.L. Vermehrungsbetriebe G.m.b.H. v. Council and Commission of the European Communities, 349, 352-3  
 Beagle Channel Case, 300  
 Bethell, *Re*, 239  
 Bonser v. La Macchia, 52-3, 58, 86, 263  
 Brazilian Loans Case, 288  
 British Beef Co. v. Intervention Board for Agricultural Produce, 346  
 British Caledonian Airways Ltd. v. Langhorne M. Bond (Administrator, Federal Aviation Administration), 465-6  
 British Petroleum v. Government of Libya, 300  
 Buchanan (James) & Co. Ltd. v. Babco Forwarding and Shipping (U.K.) Ltd., 312, 317, 318, 319-20, 321  
 Carlisle (Mayor and Corporation of) v. Graham, 174, 176  
 Casdagli v. Casdagli, 244  
 Chamizal Arbitration, 180  
 Charmasson v. Minister for Economic Affairs, 343  
 Chen Yin Ten v. Little, 263-4, 265  
 Clippens Oil Co. v. Edinburgh and District Water Trustees, 350  
 Colegrove v. Green, 187  
 Commission of the European Communities v. France ('Mutton and lamb'), 270, 343-6  
 Commission of the European Communities v. Italian Republic, 345  
 Commission of the European Communities v. Luxembourg and Belgium, 344  
 Commission of the European Communities v. United Kingdom ('Potatoes'), 343, 344  
 Commission of the European Communities v. United Kingdom ('Tachographs'), 344  
 Commissioner of Police v. Banos, 265-6  
 Commissioners of Her Majesty's Woods and Forests v. Gammell, 168, 183  
 Comptoir National Technique Agricole v. Commission of the European Communities, 353  
 Conditions of Admission of a State to Membership in the United Nations, 189  
 Congreso del Partido, I<sup>o</sup>, 271, 326, 424, 425, 430, 431, 433  
 Consorts Tarnay c. Compagnie Varig, 312  
 Corbett v. Corbett, 341  
 Corfu Channel Case, 89, 90, 113, 121, 408, 469-70  
 Cristina, *The*, 424  
 D. v. Commissioner of Taxes, 49  
 Dacre (Leonard), Attainder of, 176  
 Danzig (Free City of) and the International Labour Organization, 212-13, 214  
 Davis v. Johnson, 317  
 Debtor, *In re a, ex parte* Viscount of the Royal Court of Jersey, 304  
 Defrenne v. Sabena, 313

<sup>1</sup> The figures in heavier type indicate the pages on which cases are reviewed.



- De Weer Case, **329-32**  
 De Wilde, Ooms and Versyp (Vagrancy) Cases, 280, 282, 333  
 Dietz v. Commission of the European Communities, 346  
 Director of Public Prosecutions v. McNeill, 58  
 Dollfus Mieg et Cie. S.A. v. Bank of England, 428  
 Dominion Coal Co. Ltd. and County of Cape Breton, *Re*, 52  
 Duff v. R., 304  
 Duff Development Co. Ltd. v. Government of Kelantan, 432  
 Dumortier Freres v. Council of the European Communities, 350
- Electricity Company of Sofia and Bulgaria Case, 90, 134  
 Empire of Iran Case, 327, 430  
 Engel and Others Case, 280, 282  
 English Channel Arbitration, 271  
 Eridania v. Minister of Agriculture, 348  
 Exchange of Greek and Turkish Populations, 153
- Fagernes, The*, 173, 174  
*Father Thames, The*, 325  
 Finnish Ships Arbitration, 341  
 Fisheries Case (United Kingdom v. Norway), 174  
 Fisheries Jurisdiction Cases (Federal Republic of Germany v. Iceland; United Kingdom v. Iceland), 89, 93, 94, 101-2, 106, 107-10, 111, 117, 271  
 Fothergill v. Monarch Airlines Ltd., **316-25**, 362  
*Franconia, The* (R. v. Keyn), 48, 49-51, 52, 53, 54, 55-6, 57, 58, 59-61, 267  
 Free Zones of Upper Savoy and the District of Gex Case, 173
- Gammell v. Commissioner of Woods and Forests, 168, 183  
 Gartside v. Inland Revenue Commissioners, 310-11  
 Gavin v. The Queen, 267  
 German Interests in Polish Upper Silesia Case, 152  
 German Settlers in Poland Case, 28  
 Germany, Federal Republic of (Government of) v. Sotiriadis, 325  
 Gibson v. Lord Advocate, 186  
 Gilbertson v. Mackenzie, 166  
 Golder Case, 280, 281, 282, 330  
 Great Torrington Commons Conservators v. Moore Stevens, 185  
 Grisbadarna Arbitration, 175, 181, 182, 185, 186  
 Guatemala-Honduras Boundary Arbitration, 174  
 Guzzardi Case, **335-9**, 341
- Handly's Lessee v. Anthony, 181  
 Handyside Case, 280, 282  
 Har-Shefi v. Har-Shefi, 248, 250  
 Harris v. Taylor, 170  
 Hauer v. Land Rheinland-Pfalz, **346-9**  
 Henn and Darby v. Director of Public Prosecutions, 316  
 Henry v. Geopresco International Ltd., 170  
 Hispano Americana Mercantil S.A. v. Central Bank of Nigeria, 325, 326  
 Holford v. George, 166  
 Holiday Inns S.A., Glarus, and Occidental Petroleum Corporation v. Government of Morocco, 123-61  
 Hostages Case: *see* United States Diplomatic and Consular Staff in Tehran
- Icelandic Fisheries Cases: *see* Fisheries Jurisdiction Cases  
 Inland Revenue Commissioners v. Rossminster Ltd., 309  
 Inter Science Research and Development Services (Pty.) Ltd. v. Republica Popular de Moçambique, 325  
 Interhandel Case, 105, 133  
 International Military Tribunal Judgment (Nuremberg), 444  
 International Status of South West Africa, 199  
 Internationale Handelsgesellschaft m.b.H. v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 346-7  
 Interpretation of Article 3, paragraph 2, of the Treaty of Lausanne (Mosul Case), 135  
 Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 153  
 Iran, Claim against the Empire of, 327, 430  
 Ireks-Arkady G.m.b.H. v. Council and Commission of the European Communities, **349-53**  
 Ireland v. United Kingdom, 280, 282  
 Island of Palmas Arbitration, 175, 196, 300
- Jade, The*, 311, 317  
 Johnson v. Mackenzie, 165  
 Johnson v. Morrison, 168
- Kaffraria Property Co. (Pty.) Ltd. v. Government of the Republic of Zambia, 325  
 Kahan v. Pakistan Federation, 432  
 Kawasaki Kisen Kaisha v. Bantham Steamship Co. Ltd., 304  
 Kjeldsen, Busk Madsen and Pedersen Case, 280, 282  
 Klass and Others Case, 280, 282  
 Kloebe, *Re*, 237  
 König Case, 280, 331  
 Koninklijke Scholten-Honig N.V. v. Council and Commission of the European Communities, **350-3**

- Koninklijke Scholten-Honig N.V. v. Hoofd-  
produktschap voor Akkerbouwprodukten, 346  
*Kyoan Maru, The*, 325
- Labrador Boundary, *Re*, 175, 185, 186, 187  
Larivière v. Morgan, 429, 434  
Legal Consequences for States of the Continued  
Presence of South Africa in Namibia (South  
West Africa), 216  
Lena Goldfields Arbitration, 149, 153  
Li Chia Hsing v. Rankin, **264-5**  
Liesboch Dredger v. Edison S.S., 350  
*Lotus, The*, 197  
Louisiana v. Mississippi, 175  
Luedicke, Belkacem and Koç Case, 280  
Luigi Montà of Genoa v. Cechofracht Co. Ltd.,  
304
- Macarthy's Ltd. v. Smith, **313-16**  
MacCormick v. Lord Advocate, 188  
Mackenzie v. Murray, 166  
Malcolmson v. O'Dea, 179  
Marckx Case, 280, 281, 282  
Martindale v. Duncan, 350  
Mavrommatis Palestine Concessions Case, 152  
Mighell v. Sultan of Johore, 432  
Miller v. Little, 167, 184  
Minquiers and Ecrehos Case, 304  
Monetary Gold removed from Rome in 1943,  
90  
Morris v. Beardmore, 309  
Mosul Case (Interpretation of Article 3, para-  
graph 2, of the Treaty of Lausanne), 135  
Murray v. Earl of Selkirk and Magistrates of  
Kirkcudbright, 165, 183
- Namibia Case (Legal Consequences for States  
of the Continued Presence of South Africa in  
Namibia (South West Africa)), 216  
National Union of Belgian Police Case, 280, 281,  
282  
Neumeister Case, 280, 282  
New Jersey v. Delaware, 180, 186  
New South Wales v. Commonwealth, 55, 57,  
58, 59, 60  
Nold v. Commission of the European Com-  
munities, 347, 348  
North Atlantic Fisheries Arbitration, 4  
North Sea Continental Shelf Cases, 46, 52, 53,  
186, 271, 285  
Norwegian Loans Case, 105  
Nottebohm Case, 16, 17, 90, 299  
Nuclear Tests Cases (Australia v. France; New  
Zealand v. France), 1, 89, 94, 102, 103, 106,  
110-11, 133, 292  
Nuremberg International Military Tribunal  
Judgment, 444
- O'Brien v. Sim Chem Ltd., 316  
Oswald v. McWhirter, 165, 179
- Ownership of Off-shore Mineral Rights, Refer-  
ence *re*, 52, 53
- Palmas Island Arbitration, 175, 196, 300  
Panesar v. Nestlé Co. Ltd., 309  
*Parlement Belge, The*, 424  
Penhas (Isaac) v. Tan Soo Eng, 238  
*Philippine Admiral, The*, 424, 426, 429, 433  
Phyn v. Kenyon, 166  
Pianka v. R., 58, 59, 61  
Planmount v. Republic of Zaïre, **325-7**  
Polish Upper Silesia Case (Certain German  
Interests in Polish Upper Silesia), 152  
Polydor Ltd. v. Harlequin Record Shops Ltd.,  
316  
Pool v. Council of the European Communities,  
353  
Post Office v. Estuary Radio Ltd., 173  
Prisoners of War Case: *see* Trial of Pakistani  
Prisoners of War  
Prospera Case, 145
- Quazi v. Quazi, 250, 317
- R. v. Bouchereau, 327  
R. v. Bull, 57  
R. v. Burgess, *ex parte* Henry, 12  
R. v. Cunningham, 174  
R. v. Davies, **266-7**  
R. v. Governor of Pentonville Prison, *ex parte*  
Budlong and Kember, **327-8**  
R. v. Keyn (*The Franconia*), 48, 49-51, 52, 53,  
54, 55-6, 57, 58, 59-61, 267  
R. v. Superintendent Registrar of Marriages for  
Hammersmith, *ex parte* Mir-Anwaruddin, 239  
R. v. Thompson (Ernest), 305  
Rahimtoola v. Nizam of Hyderabad, 426, 430  
Rann of Kutch Arbitration, 174, 300  
Raptis (A.) and Sons v. South Australia, 57, 87  
Rawsthorne v. Backhouse, 166  
Reel v. Holder, 304  
Review of Judgment No. 158 of the United  
Nations Administrative Tribunal, 91  
Reyners v. Belgian State, 270  
Rhode Island v. Massachusetts, 174, 175  
Ringeisen Case, 280, 282  
Robinson v. Western Australian Museum, 30  
Rothmans of Pall Mall (Overseas) Ltd. v. Saudi  
Arabian Airlines Corporation, **311-13**, 319  
Royal v. Cudahy Packing Co. 238  
Royal Dutch Case, 145  
Royal Scholten-Honig (Holdings) Ltd. v. Inter-  
vention Board for Agricultural Produce, 351  
Ruckdeschel (Albert) & Co. v. Hauptzollamt  
Hamburg-St. Annen, 349
- Santa Isabel Case, 292  
Schmeichler-Pagh Case, 299  
Schmidt and Dahlström Case, 280, 282  
Schooner Exchange v. McFaddon, 436

- Serbian Loans Case, 288  
 Silver *v.* Silver, 248  
 Smith Kline and French Laboratories Ltd. *v.* R. D. Harbottle (Mercantile) Ltd. and Others, 309-11  
 Solway Case: *see* Annandale and Eskdale District Council *v.* North West Water Authority  
 South West Africa Cases (Ethiopia *v.* South Africa; Liberia *v.* South Africa (1962 and 1966): *see also* International Status of South West Africa; Legal Consequences for States of the Continued Presence of South Africa in Namibia), 152, 259, 294  
 Spinney's (1948) Ltd. and Others *v.* Royal Insurance Co. Ltd., 303-4  
 Stag Line Ltd. *v.* Foscolo, Mango & Co. Ltd., 318, 319  
 State *v.* Kelly, 328  
 Straiton *v.* Fullerton, 174  
*Sunday Times, The*, Case, 280, 282, 306, 307, 308, 341-2  
 Swedish Engine Drivers Union Case, 280, 282  
 Swiss Federal Tribunal, Decisions 80.II.53, 94.I.80, 95.II.442, 99.II.260: 145  
  
 Templar Arbitration, 1  
 Texaco and Calasiatic *v.* Government of Libya, 158, 272, 300  
 Texas *v.* Louisiana, 175  
 Thai-Europe Tapioca Service Ltd. *v.* Government of Pakistan, Ministry of Food and Agriculture, 326, 424, 426, 434  
 Thornhill *v.* Attorney-General of Trinidad and Tobago, 309  
 Töpfer *v.* Commission of the European Communities, 346  
 Trendtex Trading Corporation Ltd. *v.* Central Bank of Nigeria, 325, 326, 424, 425, 426-7, 429, 430, 434  
 Trial of Pakistani Prisoners of War Case, 89, 94, 102-3, 110, 133  
 Triquet *v.* Bath, 61  
 Tyrer Case, 280, 282  
  
 Uganda Co. (Holdings) Ltd. *v.* Government of Uganda, 325, 326, 425, 427  
 Ulster-Swift Ltd. *v.* Taunton Meat Haulage Ltd., 321  
 United City Merchants (Investments) Ltd. *v.* Royal Bank of Canada (No. 2), 325  
 United Kingdom Association of Professional Engineers *v.* A.C.A.S., 309  
 United Nations Administrative Tribunal, Review of Judgment No. 158 of, 91  
 United States *v.* Aluminum Co. of America, 446  
 United States *v.* California (1947), 49  
 United States *v.* California (1952), 187  
 United States *v.* Florida (1960 and 1975), 49  
 United States *v.* Louisiana (1950, 1960 and 1975), 49  
 United States *v.* Maine, 49  
 United States *v.* Pink, 30  
 United States *v.* Texas, 49  
 United States Diplomatic and Consular Staff in Tehran, 89, 91, 104, 106, 107, 110, 111-12, 113-15, 133, 134, 409, 412  
 Uppal *v.* Home Office, 309  
  
 Vagrancy (De Wilde, Ooms and Versyp) Cases, 280, 282, 333  
 Van Oosterwijck Case, 339-41  
 Virdee, *Re*, 327  
  
 Walton *v.* Arabian American Oil Co., 238  
 Western Sahara Case, 294  
 Westinghouse Electric Corporation *v.* Rio Tinto Zinc Corporation, 447  
 Wilson, Smithett and Cope Ltd. *v.* Terruzzi, 325  
 Winterwerp Case, 280, 282  
 Wisconsin *v.* Michigan, 180, 187  
 Wolfenden *v.* Wolfenden, 238  
  
 X. *v.* Federal Republic of Germany, 309  
  
 Yorigami Maritime Construction Co. *v.* Nissho-Iwai Co. Ltd., 58



# INDEX

- Acquired rights, principle of, 197, 346: *see also* State succession
- Afghanistan, 368, 369-70, 383, 472-3, 474-5
  - intervention by U.S.S.R. in, 369, 383, 472-3, 474-5
  - regime in, 368, 370
- Air space, sovereignty over, 56, 463-4
- Aircraft, aviation, 311-13, 316-25, 367, 464-6
  - Chicago Convention on International Civil Aviation (1944), 367, 465-6
  - jurisdiction and control over, 464-6
  - Warsaw Convention (1929) and Hague Protocol (1955) on International Carriage by Air, 311-13, 316-25
- Anguilla, status of, 371, 372, 491
- Antarctic Treaty (1959), regime of, 440-1, 450-1
- Anti-trust legislation, 445-9
- Antigua, status of, 372
- Arbitration, 101, 118, 132, 470: *see also* International Centre for the Settlement of Investment of Disputes
  - Permanent Court of Arbitration, establishment of, 101, 118
  - provisional measures, power to order, 132
  - States and international organizations, between, 470
- Archipelagos, 70, 73, 82
  - status of, 73, 82
  - transit passage through, 70
- Armed forces, status in United Kingdom of United States, 417
- Asylum, 403
- Australia, 12, 48-9, 51-4, 57-8, 263-5
  - maritime zones of, 48-9, 51-4, 57-8, 263-5
  - treaties, implementation of, 12
- Bahamas, maritime zones of, 265-6
- Baltic States, incorporation in U.S.S.R. of, 368, 370, 376
- Bays, 179, 452
  - boundaries in: *see* Boundaries
  - definition of, 179, 452
  - Solway Firth, status of, 179
- Belize, status of, 372
- Berlin, West, concurrent jurisdiction in, 443-4
- Boundaries, 163-88
  - African, 174
  - bays: *see subheading* rivers and bays *below*
  - England and Scotland, between, 163-88
    - international law, applicability of, 174-5
    - land boundary, 163, 173, 176-7, 182
    - water boundary, 163-88
  - existing interests, principle of non-interference with, 181, 182, 185, 186
  - federal States, 174-5
  - municipal law, relevance of, 173-4
  - rivers and bays, 163, 169-70, 178-87
    - equidistance line, 170, 184
    - general direction of land territory, 181-2, 186
    - medium filum aquae*, 163, 169-70, 178-9, 180, 182, 183, 184, 185, 186
    - thalweg, 170, 178-9, 180, 184, 186
    - uti possidetis*, doctrine of, 174
- Brownlie, Soviet translation of *Principles of Public International Law* of, 254, 256, 257, 258-61
- Canada, 51, 52, 53, 266-7, 365, 374-5, 398
  - fishery zone, delimitation of and jurisdiction in, 266-7
  - sovereignty of, 365
  - succession to treaties by, 374-5, 398
  - territorial sea, juridical nature of, 51, 52, 53
- Chagos Archipelago, evacuation of inhabitants of, 402
- Channel Islands, status of, 304, 370-1
- China, recognition of, 226
- Conciliation, 123, 469, 470
- Condominium: *see* New Hebrides
- Confederation: *see* Unions of States
- Conference on Security and Co-operation in Europe, Final Act of the (1975) (Helsinki Final Act), 366, 403-5, 406, 438, 474-5
- Conflict of laws, 156-7, 170, 231-52, 311-13, 327, 449, 450, 491
  - adoption, 237
  - bankruptcy, 237
  - characterization, 246, 251
  - choice of law: *see subheading* inequality of applicable law *below*
  - contract, 156-7
  - divorce, 234, 236, 248, 249-50
    - choice of law, 234
    - recognition of foreign, 236, 248, 249-50
  - domicile, 244, 312-13
    - acquisition of, 244
    - meaning of, 312-13
  - foreign law, 235-6, 237, 244, 249, 327
    - fact, treatment as question of, 237, 244, 249
    - public laws, non-enforcement of, 327
    - recognition of, 235-6
  - inequality of applicable law, 231-52
    - colonial legal systems, 234
    - evolutionary depth of legal systems, 240-1, 242-50
    - history and nature of problem, 231-41
    - legislation affecting, 237, 249
    - lex fori*, preference for, 232, 234-5, 237, 242
    - preference, principle of, 235

- Conflict of laws (*cont.*):  
 inequality of applicable law (*cont.*):  
   reciprocity, 236, 251  
   religious legal systems, 246, 247-8  
   solutions, proposed, 235, 242-52  
   time factor, 240, 241, 249  
 judgments, foreign, recognition and enforcement of, 170, 231, 234, 236, 244, 248, 449, 450, 491  
 jurisdiction, 170, 231, 234, 235, 239-40, 244, 248, 311-13  
   choice of, 170, 231, 234, 235, 239-40, 244, 248, 311-13  
   service of process out of, 239-40  
 marriage, 238, 239, 244, 249, 250  
   polygamous, 239, 244, 249, 250  
   validity of, 238  
 public policy, 234, 236, 242, 249  
 renvoi, 251  
 tort, 238
- Consular relations, 104, 115, 416-17, 431, 491  
 access, consular, 417  
 fees, levy of consular, 416-17, 491  
 rates, exemption of consular premises from, 431  
 Vienna Convention on (1963), 104, 115, 417
- Contempt of court, 306-9
- Contiguous zone, 62-6, 263  
 claims to, 263  
 limited war in, 62-6
- Continental shelf, 46, 52, 53, 54, 57-8, 103, 173, 456-8  
 Aegean Sea, 103  
 Crown rights in, 53, 58  
 delimitation of, 46, 173, 456-8  
 juridical nature of, 52, 53, 54, 58, 457-8  
 Seas and Submerged Lands Act 1973 (Cth.), 57-8
- Contracts, 156-7, 303-4  
 conflict of laws, 156-7  
 interpretation of, 303-4  
 State or transnational: *see* International Centre for the Settlement of Investment Disputes  
 State succession to: *see* State succession
- Council of Europe, 198, 386  
 admission to membership in, 198  
 effect of decisions of Committee of Ministers, 386
- Crown rights, 48, 50, 53, 54-7, 58, 60, 168, 173  
 bounds of State, prerogative power to establish, 173  
 cession of territory, 55  
 continental shelf, 53, 58  
 salmon fishing in Scotland, 168  
 sea bed, 48, 53, 54-5, 58, 167-8  
 territorial sea, 48, 50, 53, 55-7, 58, 60
- Customary international law, 78-81, 82, 260, 261  
*opinio juris*, 80  
 source of law, as, 260, 261  
 State practice, role of, 78-81, 82
- Cyprus, status of British military bases in, 440, 441, 442
- Damage, remoteness of, 350, 351
- Danzig, status of Free City of, 212-13, 214
- Debts, State succession to: *see* State succession
- Declaratory judgments, availability and propriety of, 171, 309
- Diego Garcia, status of, 402, 439, 443
- Diplomatic protection, 125, 144, 468-9: *see also* International Centre for the Settlement of Investment Disputes; Nationality of claims exclusion under Convention on the Settlement of Investment Disputes (1965), 125, 144  
 United Kingdom practice, 468-9
- Diplomatic relations, 91, 104, 115, 225, 261, 367-8, 407-16, 418-22, 431, 433, 477-9, 491  
 accommodation, duty to assist in finding, 433  
 Diplomatic Privileges Act 1964, 415, 416, 418  
 hostages, taking of diplomatic personnel as, 104, 408, 409, 410, 411, 412-14, 415, 477-9, 491  
 immunity, diplomatic, 408, 411, 412, 415, 418-22, 431  
   bags, diplomatic, 412, 419, 422  
   criminal jurisdiction, 415, 418, 420-2  
   rates, 408, 415, 418, 431  
   waiver, 422
- Libyan People's Bureau, status of, 411-12, 414, 421  
 premises, inviolability of, 408, 419  
 privileges of diplomats, 410-11, 412, 415, 418-19  
 protection, duty of, 409, 414, 416  
 Soviet views on, 261  
 status, certificate of diplomatic, 416  
 United Kingdom, of, 367-8, 407-8, 409-10  
 Vienna Convention on (1961), 91, 104, 115, 225, 409, 411, 412, 414, 415, 416, 418-19, 421, 422, 433
- Discrimination: *see* Non-discrimination
- Disputes, 99, 100-4, 105, 123-61, 187-8, 468, 469  
 boundary, judicial settlement of, 187-8  
 England and Scotland, settlement of disputes between, 188  
 General Acts for Pacific Settlement of (1928 and 1949), 99, 102, 103, 132  
 Investment Disputes, Convention on the Settlement of (Washington Convention) (1965), 123-61 *passim*, 468, 469  
 justiciable nature of, 101  
 vital interests, involving, 100-4, 105
- Divorce: *see* Conflict of laws
- Domestic jurisdiction, 105, 199, 407
- Domicile, 244, 312-13  
 acquisition of, 244  
 meaning of, 312-13

- Dominions, British, status and treaty relations of, 6-8, 33, 34, 56
- East Timor, 370, 375-6, 475  
self-determination in, 375-6, 475  
status of, 370, 475
- England, 163-88  
boundary with Scotland, 163-88: *see also* Boundaries  
disputes with Scotland, settlement of, 188  
union with Scotland, 173, 175, 177-8, 186, 188
- Equity, 15, 16, 29, 46, 47, 187
- Eritrea, status of, 442, 443
- Estoppel, 9, 141, 170
- Eurocontrol (European Organization for the Safety of Air Navigation), 377-8, 464  
functions of, 377, 464  
immunities and privileges of, 377-8
- European Commission of Human Rights: *see* Human rights
- European Communities, 198, 305, 310, 313-16, 327, 343-53, 362, 388-94, 400, 401, 412-14, 477-9  
Act of Accession of Denmark, Ireland and United Kingdom (1972), 343-4, 391, 394  
admission to membership in, 198  
Assembly, powers of, 389-90  
capital flows, regulation of, 390-1  
Common Agricultural Policy, 349-50, 351-2, 390  
Common Commercial Policy, 393-4  
competition, maintenance of, 393  
Court of Justice, 305, 315, 343-53, 388-9, 393  
constitution and functions of, 388-9  
decisions, 305, 315, 343-53, 393: *see also under subject-matter*  
sanctions for failure to comply with decisions, 345  
discrimination between producers, 349-50, 351-2  
discrimination on grounds of sex, 313-16  
equal pay for men and women, 313-16  
equality, principle of, 349  
European Communities Act 1972, 313, 315, 316  
fundamental rights, 346-9  
human rights, relationship to Community law of, 347  
movement of goods, freedom of, 343-6  
movement of persons, freedom of, 327, 400, 401  
patents, regulation of, 310  
proportionality, principle of, 348  
rail traffic, regulation of, 391-2  
regulations, invalidity of for breach of Treaty of Rome, 349-53  
reprisals, illegality of, 344  
Rome, Treaty of, 305, 313-16, 327, 343, 345, 346, 349, 351, 352, 353, 362, 389, 390, 392, 393, 401, 478  
sanctions, imposition on Iran of, 412-14, 477-479  
tortious liability for invalid regulations, 349-353  
United Kingdom law, compatibility with Community law of, 390-2  
United Kingdom law, effect of Community law in, 313-16, 394  
United Nations, co-operation of Community members in, 394
- European Convention on Human Rights: *see* Human rights
- European Court of Human Rights: *see* Human rights
- Ex injuria jus non oritur*, principle of, 217-19, 228
- Exclusive economic zone, 263, 458, 461
- Exclusive fishery zone: *see* Fishery limits
- Executive certification of issues of fact, 303-4, 427-8  
propriety of requesting, 303-4  
State immunity and, 427-8
- Expropriation, 305-6, 467-8, 469
- Extradition, 327-8, 402-3, 483  
double criminality, principle of, 327-8  
nationals, non-extradition of, 327  
nuclear material, offences relating to, 483  
political offences, non-extradition for, 327, 403  
Terrorism, European Convention on the Suppression of (1977), 402-3
- Falkland Islands, status of, 372, 440-3, 451
- Federal States, 47-61, 174-5, 200, 241, 250, 423, 427  
boundaries in, 174-5  
conflict of laws in, 241, 250  
immunity of constituent territories, 423, 427  
sovereignty and powers within, 48-9, 51-4, 57-8, 200  
succession to treaties: *see* Unions of States  
territorial sea, 47-61: *see also* Territorial sea
- Fishery limits, 48, 101-2, 164-9, 173-4, 176, 177-8, 183-4, 263-7, 457, 458-61  
Australian, 48, 263-5  
Bahamian, 265-6  
Canadian, 266-7  
delimitation of, 263-7, 457, 458-61  
English and Scots law, fishing rights in, 167, 173-4  
Fishery Limits Act 1976, 164, 460  
Icelandic, 101-2  
jurisdiction in, 263-7, 459-61  
Solway Firth, regulation of fishing in, 164-9, 176, 177-8, 183-4
- Food and Agriculture Organization, 190, 194-5, 196, 208-11, 213, 219, 220, 222, 224, 225, 227  
admission to membership and participation in, 190, 194-5, 196, 208-11, 213, 219, 220, 224, 227



- Food and Agriculture Organization (*cont.*):  
 immunities and privileges of, 225  
 interpretation of Constitution of, 222, 224  
 Force, limits on use of, 66-7, 82, 258, 259, 261,  
 471-5, 480-1, 484: *see also* Self-defence
- General Agreement on Tariffs and Trade,  
 admission to membership in, 190  
 General principles of law, 148, 238, 347  
 Genocide, Convention on the Prevention and  
 Punishment of the Crime of (1948), 75, 404  
 Germany, status of, 260  
 Gibraltar, status of, 376, 441  
 Good faith, principle of, 145, 152, 154-5  
 Governments, succession of, distinction from  
 State succession, 18-20, 26, 31-2  
 Grotius, views on nature of international law of,  
 76, 77-8
- Helsinki Final Act (1975), 366, 403-5, 406, 438,  
 474-5  
 Higgins and Colombos, Soviet translation of  
*International Law of the Sea* of, 254, 257, 261  
 High seas, 62-6, 225, 436-7, 453, 454-6  
 Geneva Convention on (1958), 225, 454  
 hot pursuit, right of, 454  
 jurisdiction on, 454-6  
 limited war and, 62-6  
 navigation, freedom of, 453  
 pollution, control of, 436-7, 451, 454, 455-6  
 Holy See, recognition of, 366  
 Hong Kong, status of, 371  
 Hostages, taking of diplomatic personnel as,  
 104, 408, 409, 410, 411, 412-14, 415, 477-9,  
 491  
 Human rights, 74-5, 280-2, 305, 306-9, 329-42,  
 347-8, 366, 386, 403-7, 438, 471, 472,  
 474-5  
 association, freedom of, 309  
 Bill of Rights, proposed United Kingdom,  
 406-7  
 Child, United Nations Declaration of the  
 Rights of the (1959), 404  
 degrading treatment or punishment, freedom  
 from, 405  
 Elimination of All Forms of Racial Dis-  
 crimination, Convention on (1966), 75  
 Elimination of Discrimination against  
 Women, Convention on (1979), 405-6  
 European Commission of Human Rights,  
 decisions of, 329-42: *see also under subject-*  
*matter*  
 European Convention on Human Rights  
 (1950) and Protocols, 305, 306-7, 308,  
 309, 329-42, 347, 386, 406: *see also sub-*  
*headings for particular rights and freedoms*  
 English law, effect in, 305, 307, 308, 309  
 individual petition, right of, 309, 334, 406  
 'just satisfaction' (Art. 50), award of, 331,  
 338, 341-2  
 local remedies, requirement of exhaustion  
 of, 331, 333, 337-8, 341  
 'public emergency' (Art. 15), meaning of,  
 338-9  
 European Court of Human Rights, 280-2,  
 306-7, 308, 329-42, 406, 407  
 judgments, 280-2, 306-7, 308, 329-42: *see*  
*also under subject-matter*  
 jurisdiction, United Kingdom acceptance  
 of, 406, 407  
 objections to admissibility, appropriate time  
 for, 333-5  
 expression, freedom of, 306-9  
 Helsinki Final Act (1975), 366, 403-5, 406,  
 438, 474-5  
 inhuman treatment or punishment, freedom  
 from, 405  
 legal assistance, right to, 332-4  
 liberty, right to, 335-8  
 life, right to, 332  
 marriage, right to, 339, 340  
 movement, freedom of, 336, 338, 406  
 O'Connell, views of, 74-5  
 private life, right to, 339-40  
 property, right to, 347-8  
 religion, freedom of, 403-4  
 thought, freedom of, 403  
 torture, freedom from, 405  
 trial, right to fair, 329-32  
 United Nations Charter provisions, 75, 471,  
 472  
 United Nations Covenants (1966), 75, 403, 471  
 Universal Declaration of Human Rights  
 (1948), 75, 375, 403, 471  
 Hyde, Soviet views on works of, 255-6
- Immunity of diplomatic agents, 408, 411, 412,  
 415, 418-22, 431  
 bags, diplomatic, 412, 419, 422  
 criminal jurisdiction, 415, 418, 420-2  
 rates, 408, 415, 418, 431  
 waiver, 422  
 Immunity of international organizations, 212,  
 225, 376-83, 384, 418  
 Immunity of States, 81, 325-7, 422-36  
 absolute immunity, doctrine of, 424, 425-7  
 actions *in personam/in rem*, 326, 424, 426-7,  
 429, 433  
 acts *jure gestionis/jure imperii*, 326-7, 428-9,  
 432  
 banks, central, 435  
 Brussels Convention on Immunity of State-  
 owned Vessels (1926) and Protocol (1934),  
 423, 427, 429, 433  
 commercial transactions, 429-31  
 constituent territories of federal States, 423,  
 427  
 counter-claims, 432  
 customs duties, 431  
 enforcement of judgments, 434-5

- entities, separate, 425-6, 427-8
- European Convention on State Immunity (1972), 422-3, 427, 433, 435
- executive certification, role of, 427-8
- immovable property, 433-4
- movable property, 433-4
- personal immunity, 422, 423
- procedural rules, 435
- rates, 431
- reciprocity, 428, 431, 435
- restrictive immunity, doctrine of, 325-6, 424, 427
- ships, 423, 427, 429, 432-3
- State Immunity Act 1978, 81, 326, 327, 422, 423-4, 425, 427, 428, 429-31, 432, 433-5
- taxation, 431
- territorial jurisdiction, relationship to, 435-6
- waiver, 432
- Independence, 194, 196-200, 213, 224, 225, 228, 365-6, 370, 371, 372, 373, 395-8, 401: *see also* State succession
- INMARSAT, immunities and privileges of, 376-7
- Intergovernmental Maritime Consultative Organization, admission to membership in, 189-90, 195, 227
- Internal waters, definition of, 452
- International Atomic Energy Agency, 189-90, 194
  - admission to membership in, 189-90
  - Middle Eastern Regional Radioisotope Centre, membership of, 194
- International Bank for Reconstruction and Development, admission to membership in, 190
- International Centre for the Settlement of Investment Disputes, arbitration by, 123-61, 468, 469
  - diplomatic protection, exclusion of, 125, 144
  - Holiday Inns v. Morocco*, 123-61
    - dispute, history and facts of, 123-32
    - jurisdiction, questions of, 137-55, 156
    - loan contracts, issues concerning, 155-60
    - Moroccan courts, role of, 133-6, 155-60
    - provisional measures, 132-7, 160
- Investment Disputes, Convention on the Settlement of (Washington Convention) (1965), 123-61 *passim*, 468, 469
- jurisdiction, 137-55, 156
  - consent as basis, 138-46, 150
  - parties, designation and nationality of, 137-55, 156
- International Court of Justice, 89-122, 132, 133, 135, 212, 221-2, 224, 225, 226, 238, 250, 386, 469-71
  - advisory opinions, 222, 470, 471
    - capacity to request, 471
    - effect, 222, 470
  - default, judgment by, 92, 93, 96-7, 107-9, 111, 112, 117-18, 120-1
  - error in judgment, 469-70
  - interim measures of protection, 90, 91, 93, 97, 104, 107, 110, 111, 112, 114, 121, 132, 133, 135
  - interpretation of constitutions of international organizations, 221-2
  - joinder of jurisdictional issues to merits, 114-115, 121
  - judgments, binding force of, 98-9, 100, 116, 121, 222, 386
  - jurisdiction, 89-91, 92-3, 96-7, 99-100, 102, 103, 104-6, 107-8, 110, 111, 112-13, 115-16, 118-21, 250, 470-1
    - ad hoc* consent, 90, 92, 99, 113, 118, 120
    - automatic reservations, 104-5
    - compulsory, 99-100, 104-6, 112, 118-20, 470-1
    - conflict of laws, in respect of, 250
    - consent as basis, 92, 99, 120
    - duty of Court to satisfy itself concerning, 92-3, 97, 107-8, 110, 111, 112-13, 120-121
    - forum prorogatum*, 103, 113, 115-16
    - objections, 89-91, 93, 96-7, 100, 107, 111, 112, 113, 120, 121
    - Optional Clause, 99-100, 102, 103, 104-6, 112, 470-1
    - reciprocity, 99-100, 105, 470-1
    - reservations, 104-5, 471
  - 'non-appearance', 89-122
    - advantages for non-appearing State, 89, 91, 98, 105, 106, 109-10, 113, 114, 117-18, 121-2
    - Court, attitude of, 94, 98, 104, 106-18
    - motivation of non-appearing State, 98, 99-106
    - nature of problem, 89-94
    - O'Connell, views of, 94-6, 97, 98, 103-4, 106, 108, 114, 116
    - proof, effect on burden of, 96, 113, 115, 120
    - remedies, 113, 116, 120-2
- Rules of Court, 95, 96-7, 108, 111, 132
- Statute, 90, 91, 92, 93, 96-7, 98, 99, 100, 103, 107-9, 111, 112, 113, 114, 116, 117, 120-1, 132, 212, 224, 225, 226, 238, 470, 471
  - Art. 34: 91, 212, 224, 470
  - Art. 35: 224
  - Art. 36: 92
  - Art. 36(2): 99, 471
  - Art. 36(6): 90, 93, 100, 103
  - Art. 37: 92
  - Art. 38(1)(c): 238
  - Art. 41: 132
  - Art. 48: 132
  - Art. 53: 92, 93, 96-7, 99, 107-9, 111, 112, 113, 114, 116, 117, 120-1
  - Art. 59: 98, 116, 121
  - right to become party to, 224, 225, 226

- International Development Association, 189-90, 386  
 admission to membership in, 189-90  
 effect of decisions of, 386
- International Energy Agency, effect of decisions of governing board of, 386
- International Finance Corporation, admission to membership in, 190
- International Labour Organization, 6, 189-90, 194, 196, 200, 211-17, 219, 220, 222-3, 224, 225  
 admission to membership and participation in, 189-90, 194, 196, 211-17, 219, 220, 222-223, 224  
 immunities and privileges of, 212, 225
- International Labour Conference, 200, 212, 214-16, 217, 223  
 composition of, 212  
 resolutions on Namibia, 200, 214-16, 217, 223
- International Labour Conventions, State succession and, 6  
 interpretation of Constitution of, 222, 224  
 rights and obligations of members, 212
- International law, 44, 46, 73-81, 148, 217-19, 221, 238, 253-62, 347, 363-4  
 American concept, 253-4  
 codification, views of O'Connell on, 44, 46, 81  
 codification and development by United Nations, 364  
 continental concept, 253  
 English concept, 253-4, 256-7, 261-2  
 municipal law, relationship to: *see* Municipal law  
 nature and practice, views of O'Connell on, 73-81  
*non liquet*, 181  
 nullity, 217-19, 221  
 private: *see* Conflict of laws  
 Scottish concept, 253  
 sources, 148, 238, 259-60, 261, 347, 363-4  
 consent, 259-60  
 custom, 260, 261  
 general principles, 148, 238, 347  
 treaties, 260, 261, 363-4  
 Soviet translations of English doctrine, 254-62  
 Brownlie, 254, 256, 257, 258-61  
 Higgins and Colombos, 254, 257, 261  
 Oppenheim-Lauterpacht, 254, 255-6, 257-258, 262  
 Satow, 254, 261  
 Shawcross and Beaumont, 254-5  
 Soviet views of role, 260-1  
 subjects: *see* Organizations, international; States
- International Law Association, work on State succession of, 2, 5, 34, 35, 37, 41-2, 45
- International Law Commission, 3, 31-47, 81  
 O'Connell's views on work of, 41, 42-4, 81  
 State succession, work on, 3, 31-47
- International Monetary Fund, 190, 197, 386  
 admission to membership in, 190, 197  
 effect of decisions of, 386
- International Telecommunications Union, admission to membership in, 190, 227
- Intertemporal law, 175, 181
- Intervention, 365-6, 369, 383, 472-5
- Iran, 104, 408, 409, 410, 411, 412-14, 415, 477-9, 491  
 hostages, taking of, 104, 408, 409, 410, 411, 412-14, 415, 477-9, 491  
 Iran (Temporary Powers) Act 1980, 412, 413, 477-9, 491  
 sanctions imposed by E.E.C., 412-14, 477-479
- Israel, 366, 373, 479-82  
 belligerent occupation of territory by, 479-82  
 creation of, 373  
 status of, 366
- Jenks, C. W., 4, 8, 23, 34, 256, 257, 262  
 Soviet views on works of, 256, 257, 262  
 State succession, views on, 4, 8, 23, 34
- Judgments, foreign, recognition and enforcement of, 170, 231, 234, 236, 244, 248, 449, 450, 491
- Jurisdiction, 105, 199, 263-7, 407, 435-6, 439-450, 454-6, 464-5, 491: *see also* Conflict of laws  
 aircraft, over, 464-5  
 concurrent, 443-4  
 domestic, 105, 199, 407  
 extra-territorial, 444-50, 491  
 fishery zones, in, 263-7  
 military, 439  
 ships, over, 454-6  
 territorial, 435-6, 440-4
- Jus cogens*, 74, 75-6, 259, 470
- Lauterpacht, Sir Hersch, 105, 254, 255-6, 257-8, 262  
 automatic reservations, views on, 105  
 Soviet translation of edition of Oppenheim's *International Law*, 254, 255-6, 257-8, 262
- League of Arab States, admission to membership in, 198
- League of Nations, 197, 198, 212-13, 223  
 admission to membership in, 197, 198, 212-13, 223  
 Covenant, 197, 198  
 Danzig, administration of, 212-13  
 mandates system: *see* Mandates
- Libyan People's Bureau, status as diplomatic mission of, 411-12, 414, 421
- Local remedies, exhaustion of, 159, 331, 333, 337-8, 341
- Mandates, 41, 199, 214, 215, 258  
 nature of system, 258



- South West Africa, status of, 199, 214, 215: *see also* Namibia
- succession to treaties, 41
- Marriage: *see* Conflict of laws
- Most-favoured-nation treatment, 233, 438-9
- Municipal law, 10, 23, 26-7, 29, 48, 56, 59-61, 73, 82, 173-5, 199, 232, 233-4, 260, 305, 307, 308, 309-25, 362
- international law, relationship to, 10, 23, 26-7, 29, 48, 56, 59-61, 73, 82, 173-5, 199, 233-4, 260, 362
- presumption of consistency with international law, 266, 308, 311
- sources, 232
- statutes, use of treaties in interpretation of, 309-25, 362
- treaties, effect of, 233-4, 305, 307, 308, 309, 313, 362
- Namibia, 190-228, 384-5, 386, 395
- exports and imports, control of, 384-5, 386
- legal status, 196-200, 213-14, 215, 223-7, 228, 395
- occupation by South Africa, 214, 215, 216, 217, 218, 223, 225, 395
- organizations, admission to international, 190-1, 196, 198, 199-200, 205-19, 220-3, 224-5
- F.A.O., 208-11, 219, 220, 224-5, 228
- I.L.O., 212-17, 219, 220, 224-5, 228
- W.H.O., 205-8
- South West Africa People's Organization, status of, 191, 193, 195-6, 214, 395
- treaties, capacity to accede to, 225
- United Nations Council for Namibia, 190-6, 200, 201-5, 207-17, 219-20, 228, 385, 386, 395
- conferences, admission to and participation in international, 201-5, 219-20, 228
- legal status, 191, 192-6, 200, 213, 217, 219, 227-8, 385, 386, 395
- organizations, admission to and participation in international, 190-1, 194-6, 207-217, 219-20, 228
- 'Nation', distinction from 'State', 210-11
- Nationality, 16, 17, 31, 138, 139, 143, 144, 398-402, 406, 448, 453-4, 468
- acquisition of, 399-402
- corporations, of, 138, 139, 143, 144, 448, 468
- ships, of, 453-4
- State succession, 16, 17, 31, 398
- United Kingdom legislation, proposed, 398-401, 406
- Nationality of claims, 28, 74, 468-9: *see also* International Centre for the Settlement of Investment Disputes
- continuous nationality rule, 28, 74
- dual nationals, 469
- State succession, 28
- United Kingdom practice, 468-9
- Nationalization, 467-8
- Natural law, 74, 75-80, 233, 256, 258
- Naval power: *see* Sea power, international law and
- New Hebrides, 73, 395-8, 461, 491
- maritime zones of, 461
- nationality in, 398, 401
- status and independence of, 73, 395-8, 491
- Non-discrimination, principle of, 75, 232, 313-316, 349-50, 351-2, 405-6: *see also* Human rights
- Novation, 3, 4, 6, 9, 10, 30, 47
- Nuclear weapons, testing and use of, 102, 482-3
- Nullity in international law, 217-19, 221
- O'Connell, Professor D. P., 1-87, 94-6, 97, 98, 103-4, 106, 108, 114, 116
- bibliography of printed work, 83-7
- codification, views on, 44, 46, 81
- nature and practice of international law, views on, 73-81
- non-appearance by defendant before I.C.J., views on, 94-6, 97, 98, 103-4, 106, 108, 114, 116
- sea power and international law, work on, 61-73
- State succession, work on, 2-47
- territorial sea in federal States, work on, 47-61
- Oppenheim, Soviet translation of Lauterpacht's edition of *International Law* of, 254, 255-6, 257-8, 262
- Organization of African Unity, 174, 195, 196, 198, 200, 220
- admission to membership in, 198, 220
- resolution on African boundaries, 174
- resolutions on Namibia and South West Africa People's Organization, 195, 196, 200
- Organization of American States, admission to membership in, 198
- Organizations, international, 189-229, 376-87: *see also under names of particular organizations*
- admission to membership and participation in, 189-229, 383-4: *see also* Namibia
- expulsion from, 383
- immunities and privileges of, 212, 225, 376-83, 384
- interpretation of constitutions of, 221-2, 224
- legal effect of acts of, 384-7
- personality, international legal, of, 194
- recognition, collective, by, 223-7, 228
- Outer space, 466
- Palestine Liberation Organization, status of, 368-9
- Papua New Guinea, status of, 491
- Permanent Court of Arbitration, establishment of, 101, 118
- Permanent Court of International Justice, 101, 118, 133

- Permanent Court of International Justice (*cont.*):  
 establishment of, 101, 118  
 provisional measures, power to order, 133
- Personality, international, 194, 200-1  
 Namibia, 200  
 not-fully-sovereign States, 200-1  
 organizations, international, 194  
 United Nations Council for Namibia, 194
- Pollution, control of, 436-7, 451, 454, 455-6
- Ports, jurisdiction in, 50
- Positivism, 78, 256, 257
- Private international law: *see* Conflict of laws
- Protection, diplomatic: *see* Diplomatic protection
- Protectorates and protected States, succession to  
 treaties of, 8, 18, 20, 32, 40
- Pufendorf, views on nature of international law  
 of, 76, 78
- Recognition, 63, 189, 193, 199, 217-19, 221,  
 223-7, 228, 233, 236, 258, 260, 303, 304,  
 366-70, 373  
 belligerency, of, 63, 303, 304  
 collective, 223-7, 228  
 executive certification of, 303, 304  
 foreign law, of: *see* Conflict of laws  
 governments, of, 367-8  
 implied, 223-7  
 nature and effect of, 189, 199, 226, 233, 236,  
 258, 260  
 non-recognition, 63, 193, 217-19, 223, 368-70  
 premature, 221  
 States, of, 366, 367, 368, 373
- Refugees, 402, 403
- Reprisals, legality in E.E.C. law of, 344
- Rhodesia, Southern, 6-7, 385, 475-7: *see also*  
 Zimbabwe  
 sanctions against, 385, 475-7  
 status of, 6-7
- Rivers, international, 462: *see also* Boundaries
- Rockall, status of, 440, 457
- St. Kitts-Nevis, status of, 371, 372
- Satow, Soviet translation of *Guide to Diplomatic Practice of*, 254, 261
- Schwarzenberger, Soviet views on works of, 256, 262
- Scotland, 163-88  
 boundary with England, 163-88: *see also*  
 Boundaries  
 disputes with England, settlement of, 188  
 union with England, 173, 175, 177-8, 186, 188
- Sea, Third United Nations Conference on the  
 Law of the, 179, 204-5, 219, 228, 455, 462-3  
 participation of United Nations Council for  
 Namibia in, 204-5, 219, 228  
 pollution, proposals on, 455  
 Revised Informal Composite Negotiating  
 Text, 179, 455  
 sea bed mining, proposals on, 462-3
- Sea bed, sovereignty over and rights in, 48, 53,  
 54-5, 56, 58, 167-8, 462-3: *see also* Continental  
 shelf
- Sea power, international law and, 61-73  
 influence of international law, 61-2, 70-3  
 limited war, 62-6, 69  
 missiles, use of long-range unguided, 69  
 self-defence, 62, 63, 64, 65, 66-8, 71
- Self-defence, 62, 63, 64, 65, 66-8, 71, 82, 471,  
 473  
 anticipatory, 67-8  
 naval operations and, 62, 63, 64, 65, 66-8, 71,  
 82  
 proportionality, 63, 64, 67, 71  
 United Nations Charter Art. 51: 67, 471
- Self-determination, 34, 47, 193, 196, 259, 260,  
 375-6, 475
- Servitudes, State, 3, 4, 35
- Shawcross and Beaumont, Soviet translation of  
*Air Law of*, 254-5
- Ships, 429, 432-3, 453-4  
 nationality of, 453-4  
 State-owned, immunity of, 429, 432-3
- South Africa, United Nations arms embargo  
 against, 476, 477
- South West Africa, status as mandate of, 199,  
 214, 215: *see also* Namibia
- Southern Rhodesia: *see* Rhodesia, Southern
- Sovereign immunity: *see* Immunity of States
- Sovereignty, 158, 261, 364-6, 440-3, 457, 472-3:  
*see also* Independence  
 derogation from and exercise of, 158, 364-5  
 limited, doctrine of, 366, 472  
 nature of, 261, 365-6  
 territorial, 440-3, 457, 472-3: *see also* Terri-  
 tory, title to
- Spitzbergen, status of, 440
- State continuity: *see* State succession
- State contracts: *see* International Centre for the  
 Settlement of Investment Disputes; State  
 succession
- State responsibility, 28, 74, 259, 402, 408, 414,  
 466-9  
 aggressive acts, 259  
 expropriation, 467-8, 469  
 liability, basis of, 467  
 nationality of claims, 28, 74, 468-9  
 reparation, 402, 408, 414, 467-8  
 terrorism, 466
- State succession, 2-47, 81, 201-4, 219, 228,  
 373-5, 398  
 governmental succession, distinction from,  
 18-20, 26, 31-2  
 International Law Association's work, 2, 5, 34,  
 35, 37, 41-2, 45  
 International Law Commission's work, 3, 31-  
 47  
 Jenks, views of, 4, 8, 23, 34  
 matters other than treaties, 14-17, 25-31,  
 44-6, 47, 373-4

- acquired rights, principle of, 4, 5, 15-17, 25, 27, 29-30, 44, 45, 46
- contractual rights and obligations, 15, 17, 25, 28-30
- debt, national, 15
- debts, 15-16, 45, 47, 373-4
- independence and, 45, 46
- institutions, public, 16, 26-8, 29
- nationality, 16, 17, 31, 398
- nationality of claims, 28
- property, State, 16, 45, 46, 47
- unjust enrichment, principle of, 15-17, 25, 29-30, 46, 47
- unliquidated claims, 15, 16, 31
- O'Connell, work of, 2-47
- public administration, 41-2
- State continuity, distinction from, 9, 10, 11, 12, 18-20, 23, 26, 31-2, 37-9, 47
- treaties, 2, 3-14, 18-26, 31, 32-44, 45, 46-7, 81, 201-4, 219, 228, 374-5, 398
  - annexation and, 12, 21, 22
  - boundary, 35
  - cession and, 12, 22
  - decolonization: *see subheading* independence *below*
  - devolution agreements, 8, 24
  - dispositive, 2, 4, 5, 14, 21, 22, 23-4, 35, 42
  - executive, 4, 11-12
  - extradition, 42
  - human rights, 374-5
  - independence and, 6-9, 13-14, 22, 23, 24-5, 33-5, 36-7, 40-1, 42, 398
  - interpretative approach, 3, 12-13, 23, 33, 43
  - law-making, 4, 8, 23, 24
  - legislative, 4, 11-12, 23
  - localized, 4, 6-7, 14, 37
  - multilateral, 4, 5, 6, 8, 23, 34-5, 42
  - personal, 3, 5, 6, 12, 14, 21, 22, 24
  - presumption of succession, 10-11, 12-14, 21-4, 25-6, 33-4, 35, 42, 43, 47
  - protectorates and, 8, 18, 20, 32, 40
  - secession and, 36-40, 43
  - unilateral declarations of succession, 24-5
  - unions of States and, 9-13, 19, 22, 33, 35-40
- United Nations Conference on, participation of United Nations Council for Namibia in, 201-4, 219, 228
- Vienna Convention on Succession of States in respect of Treaties (1978), 31, 32, 33, 34, 35, 40, 41, 42-3, 44, 45, 47, 81
- universal succession, theory of, 3, 14, 17, 25
- Statelessness, 400-1
- States, 194, 196-201, 210-11, 212-13, 220, 227, 233, 235, 239, 245, 260, 366, 373: *see also* Independence; Recognition
  - continuity of existence of, 260
  - dependent or not-fully-sovereign, 200-1, 370-2
  - equality of, 200, 233, 235, 239, 245, 366
  - federal: *see* Federal States
  - formation of, 373
  - immunity of: *see* Immunity of States
  - 'nation' and 'State', distinction between, 210-211
  - statehood, criteria for, 194, 196-200, 212-13, 220, 227, 233
- Statutes, use of treaties in interpretation of, 309-325
- Straits, freedom of passage in, 70, 453
- Suarez, views on nature of international law of, 77-8
- Taiwan, status of, 369
- Territorial sea, 47-61, 62-6, 70, 173, 179, 180, 261, 263-7, 451-2
  - breadth of, 73, 261, 451
  - delimitation of, 264-6, 451, 452
  - federal States and, 47-61
  - Geneva Convention on (1958), 58, 61, 179, 180, 261, 264, 266
  - innocent passage, right of, 56, 58, 59, 61, 70, 261, 451-2
  - juridical nature of, 48-61
  - jurisdiction in, 49-52, 55-7, 59-61, 263, 267, 451
  - limited war in, 62-6
- Seas and Submerged Lands Act 1973 (Cth.), 57-8, 264
- Territorial Waters Jurisdiction Act 1878, 50, 56, 265
- Territorial Waters Order-in-Council 1964, 173, 452
- Territory, title to, 175, 181, 199, 259, 480: *see also* Boundaries
  - intertemporal law, 175, 181
  - methods of acquisition of, 199, 259, 480
    - cession, 259
    - force, 480
    - self-determination, role of, 259
- Terrorism, 402-3, 449, 466, 474
  - European Convention on the Suppression of (1977), 402-3, 449
  - State responsibility for, 466, 474
  - Suppression of Terrorism Act 1978, 403, 449
- Tort, 238, 349-53
  - conflict of laws, 238
  - E.E.C. regulations, liability for invalid, 349-353
  - remoteness of damage, 350, 351
- Transnational contracts: *see* International Centre for the Settlement of Investment Disputes
- Treaties, 3, 7, 10-11, 12-13, 21-3, 24, 25, 33, 35, 36, 37, 38, 43, 75-6, 77, 96, 143-4, 152-5, 225, 233-4, 259, 260, 261, 305, 307, 308, 309-25, 344, 362, 363-4, 436-9, 470
  - amendment, 419
  - capacity to make and perform, 7, 10-11, 12, 36, 37, 225
  - entry into force, 436-8
  - failure to implement as international wrong, 233-4



- Treaties (*cont.*):
- interpretation, 3, 12-13, 23, 33, 43, 143-4, 152-5, 311-13, 317-25, 362
  - authentic text, reference to, 311, 312-13, 319-20
  - effective, 152-4
  - good faith, principle of, 152, 154-5
  - natural meaning, 143
  - State succession and, 3, 12-13, 23, 33, 43
  - subsequent practice, reference to, 325
  - teleological, 143-4, 318-19
  - travaux préparatoires*, reference to, 143, 311, 317, 321-5, 362
  - uniform, 320-1
  - jus cogens* and, 75-6, 470
  - municipal law, effect in, 233-4, 305, 307, 308, 309, 313
  - observance, 438
  - pacta sunt servanda*, 77
  - ratification, United Kingdom practice, 436, 437-8
  - rebus sic stantibus*, 3, 11, 21, 25, 38, 43
  - reservations, 35
  - source of international law, as, 260, 261, 363-4
  - State succession to: *see* State succession
  - statutes, use in interpretation of, 309-25
  - termination, 3, 11, 21-3, 24, 25, 96: *see also* *subheading rebus sic stantibus above*
  - third States, 438-9
  - validity, 259
  - Vienna Convention on the Law of (1969), 43, 225, 318, 322, 323, 324, 325, 344, 362, 364, 470
- Trust territories, 8, 32, 41, 199, 258, 394
- status of, 32, 199, 258
  - succession to treaties of, 8, 41
- Trusteeship Council, functions of, 394
- Turks and Caicos Islands, status of, 370, 372
- Union of Soviet Socialist Republics, 254-62, 368, 369, 370, 376, 383, 472-3, 474-5
- Afghanistan, intervention in, 369, 383, 472-3, 474-5
  - Baltic States, incorporation of, 368, 370, 376
  - Soviet translations of English international legal doctrine, 254-62: *see also* International law
- Unions of States, succession to treaties and, 9-13, 19, 22, 33, 35-40
- United Kingdom, 355-491
- practice in matters of international law, 355-491
  - treaties signed or concluded in 1980, 485-90
- United Nations, 41, 67, 75, 189-91, 192, 193, 195, 196, 197-8, 199, 200, 201, 204, 207, 210-11, 212, 213, 214, 216-17, 219, 223, 224, 226, 228, 233, 258, 259, 364, 366, 372, 375, 376, 383-5, 386-8, 394, 395, 407, 410, 411, 471, 472, 475-7, 480, 481, 484
- admission to membership, 189-90, 197-8, 210-11, 213, 214, 223, 224
  - Charter, 41, 67, 75, 189, 190, 197, 199, 210-11, 224, 226, 233, 259, 375, 384-5, 386, 388, 407, 410, 471, 472
  - Art. 1(2): 210-11
  - Art. 1(4): 211
  - Art. 2(1): 233
  - Art. 2(4): 67, 471, 472
  - Art. 2(7): 407
  - Art. 3: 190
  - Art. 4: 189, 190
  - Art. 39: 384-5
  - Art. 41: 385, 386
  - Art. 51: 67, 471
  - Art. 55: 471, 472
  - Art. 56: 471, 472
  - Art. 93: 224, 226
  - Art. 103: 471, 472
  - Chapter VII: 386
  - Chapter XI: 41, 199
  - human rights provisions, 75, 471, 472
  - limits on use of force, 75, 259, 471-2
- codification and development of international law, 364
- conferences: *see under subject-matter*
- Economic and Social Council, effect of resolutions of, 387
- European Communities, co-operation of members of, 394
- expulsion, 383
- General Assembly Resolutions, 190-1, 192, 193, 195, 196, 200, 201, 204, 207, 212, 213, 216-17, 219, 228, 259, 364, 374, 375, 385, 386, 387, 388, 394, 395, 475, 484
- 1654 (XVI) (Special Committee on Implementation of the Declaration on Granting of Independence, etc.), 394
- 2625 (XXV) (Declaration on Principles of International Law), 259, 484
- 3067 (XXVIII) (UNCLOS Rules of Procedure), 204
- 34/150 (international economic law), 364
- 35/20 (Belize), 372
- East Timor, on, 375, 475
- effect of, 216-17, 385, 386, 387, 388
- Namibia, on, 190-1, 192, 193, 195, 196, 200, 201, 207, 212, 213, 216, 219, 228, 384, 386, 395
- human rights, instruments concerning: *see* Human rights
- Namibia, Council for: *see* Namibia
- origins, 258
- representation of States, 383-4, 388
- sanctions, 385, 386, 387, 410, 411, 475-7
- Security Council Resolutions, 193, 196, 200, 216-17, 366, 375, 376, 384-5, 387, 480, 481
- East Timor, on, 375, 376
- effect of, 216-17, 384-5, 387

- Middle East, on, 366, 480, 481
- Namibia, on, 193, 196, 200, 384
- South Africa, arms embargo against, 476, 477
- Trusteeship Council, functions of, 394
- trusteeship system: *see* Trust territories
- United Nations Educational, Scientific and Cultural Organization, admission to membership and participation in, 189-90, 196, 213, 227
- United States of America, 104, 408, 409, 410, 411, 412-14, 415, 417, 445-9, 477-9, 491
  - anti-trust legislation, 445-9
  - armed forces in United Kingdom, status of, 417
  - hostages in Iran, 104, 408, 409, 410, 411, 412-14, 415, 477-9, 491
- Universal Postal Union, admission to membership in, 190, 227
- Unjust enrichment: *see* State succession
- Vanuatu: *see* New Hebrides
- War, 62-6, 69, 71, 102, 258, 303-4, 479-84
  - armaments, limitation and reduction of, 479
  - bacteriological and chemical weapons, 482
  - civil, 63, 303-4
    - naval operations in, 63
    - meaning of, 303-4
  - executive certification of state of, 303
  - Geneva (Red Cross) Conventions (1949), 102, 480, 481, 484
  - limited, 62-6, 69, 71: *see also* Self-defence
  - missiles, use of long-range unguided, 69
  - neutrality, 65-6, 69, 71, 483-4
  - nuclear weapons, testing and use of, 102, 482-3
  - occupation, belligerent, 479-82
  - Soviet views on laws of, 258
- Water Conference, United Nations, participation of U.N. Council for Namibia in, 201, 202
- West Berlin, concurrent jurisdiction in, 443-444
- Western Sahara, claims to, 369
- World Health Organization, 189-90, 195, 196, 205-8, 213, 222, 227
  - admission to membership and participation in, 189-90, 195, 196, 205-8, 213, 227
  - interpretation of Constitution of, 222
- World Meteorological Organization, admission to membership in, 190, 227
- Zimbabwe, 373-4: *see also* Rhodesia, Southern
  - independence of, 373
  - succession to debts by, 373-4





















TRENT UNIVERSITY



0 1164 0091533 0

JX21 .B7 v. 51 1980  
The British year book of  
international law

343425

DATE	ISSUED TO

343425

